Case and Comment
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The Polls as a Court of Justice

By BURDETT A. RICH

ANY serious proposal to change our system of government so that every decision of a court of justice might be reviewed and overturned by popular vote would doubtless meet with universal disapproval. It is not likely that any citizen who had occasion to demand justice would be willing to trust an adjudication of the matter by a town meeting or by popular vote of any larger body of people. A neighborhood controversy often arouses so much partisanship on both sides that even a picked jury selected for impartiality may be influenced by the popular feeling. Even in a court of justice, where a case is tried on sworn testimony, excluding hearsay, rumor, and gossip, the infirmities of human nature often make it difficult to get an entirely unbiased decision. If that be so, what would be the result if judicial decisions could be tried over again by the voters of a community and decided at the polls, where irresponsible town talk and representations of biased, if not unscrupulous, partisans, should take the place of sworn evidence? But such a system has been seriously proposed as a great reform for the review of judicial decisions on important questions of constitutional law involving the police power. The fair consideration of this proposition is unfortunately embarrassed by the fact that it has been presented by a man of great distinction and influence in the course of a political campaign. Many of his supporters will accept it through faith in him, without any independent judgment upon it; and many opponents, on the other hand, will condemn it in advance because they do not believe in him. Nevertheless, the proposition ought to be separated entirely from its relation to the present political campaign, and be considered without bias, upon its merits.

A popular vote on the adoption of a Constitution or an amendment thereof has been a customary, though not universal, method of procedure in this country, and in most states at least it can now be very easily done. It may be thought that the same thing, in substance, would be done in a yet simpler way if a statute held unconstitutional by the court should be voted constitutional by the people. Many have jumped to that conclusion, without analyzing the matters involved. It is, in the very nature of our republican form of government, appropriate for the people to decide for themselves the fundamental constitutional principles of their government. But it is one thing for the people to vote on a fundamental principle of justice; it is another thing

to ask them to vote on the application of such a rule to disputed, and often complicated, facts. For illustration, to vote on the constitutional principle that no man's property shall be taken from him for public use without just compensation is a simple matter, clear-cut, and unmistakable in its effect. Such a rule merely adopts a fundamental principle of justice, the righteousness of which can be seen by every intelligent man. But the question whether that principle is violated by a statute declaring that a barrel of apples shall not be sold for more than two dollars or a barrel of flour for more than five dollars cannot be determined by mere common sense and the sense of justice. Such a statute might amount to a confiscation of farms, or it might not. That would depend upon a mass of facts and upon deductions therefrom, which could not be made without extended investigation, thorough analysis, and accurate reasoning. The voters at large have not the time, patience, or ability to master the problems in such a controversy. Even if they all had as much intelligence and mental training as judges have, they would have to decide not on the sworn and sifted evidence of a judicial trial, but on a confused mass of irresponsible and conflicting utterances from rival newspapers, campaign orators, and zealous advocates of every class. They would have to struggle with all the specious arguments, misinformation, biased partisan statements, or reckless falsehoods, which too often characterize political campaigns. What hope, therefore, can anyone have that on a matter which involves the application of principles to complex and disputed facts, a popular vote would secure an intelligent or just decision?

To know that the questions actually decided by the courts as to the constitutionality of statutes involving the police power do not involve plain fundamental principles which can be determined by mere general intelligence and a sense of justice, one needs only to read the reports of the decisions. He will quickly find that the cases rarely if ever present a mere general principle of constitutional law, but, instead of that, involve some application of it to specific facts. The facts are not generally conceded, but disputed; and they often need extensive investigation. For instance, statutes attempting to make special regulation of the hours of woman's labor in a canning factory, tailor shop, mercantile establishment, or, indeed, any other place, must depend upon the conditions of that business and their effect upon the physical condition of the workers. The same is true of statutes limiting hours of labor in mines or any other special class of service. The whole range, indeed, of the decisions on the constitutionality of statutes is made up mainly, if not entirely, of cases in which a clear understanding of the facts involved is the first requisite to a just decision and often, as in matters of rates and prices, where the mass and complexity of the facts involved make any adequate investigation and mastery of the facts by the voters absolutely impossible.

One of the great fundamental principles of law, long antedating the adoption of any American Constitution, is that no man shall be a judge in his own case. The courts themselves have enforced this doctrine to its extreme, and the common sense of men upholds them in so doing. A man, however honest, cannot be sure that he will judge impartially and without bias on matters that specially affect his personal interest. In looking for a just decision, whether at the polls or in a court, that principle cannot be ignored. But constitutional questions often involve the personal and financial interests of many voters. For instance, if a statute passed under the stress of hard times, or during a wave of hostility to railroads, should limit passenger fares to one cent a mile, and freight rates to a corresponding schedule, and if it were proved that confiscation of railroad property would inevitably result, the courts would hold it unconstitutional. But on appeal from this decision the voters would be subject not only to the influence of any wave of popular prejudice and excitement that might exist, but also to the bias of their own financial interest as truly as if they were deciding a lawsuit to which they were parties. If there are any who think that a popular vote on such questions, when

excitement and passion were being fanned by the worst part of the press and by the demagogues that never fail at such a time, would be rendered with conscientious impartiality, further argument with them would be useless. Again, if, in a time of financial depression and high cost of living, popular feeling should induce legislation to limit the prices of meat, of butter, of flour, and of other food products to amounts which would ruin the producers, and, if with unmistakable evidence of these facts, the courts held the statutes unconstitutional, what would be the prospect of an impartial and just decision by the voters at the polls? The tendency of many people to believe what they want to believe, and of many self-seeking or fanatical agitators to help them in this belief, would make it easy to disregard any proofs that were offered as to the ruinous effect of the enactments. To be sure, such statutes would eventually defeat their own ends and bring hardship upon the people who hoped to profit by them, but, in the meantime, those against whom the statutes were aimed would have been ruined by them. The will of the people will always be in favor of justice as a principle, but the will of the people in a particular matter, under the stress of excitement or passion, and with the subtle influence of their own financial interests, may be very far from just.

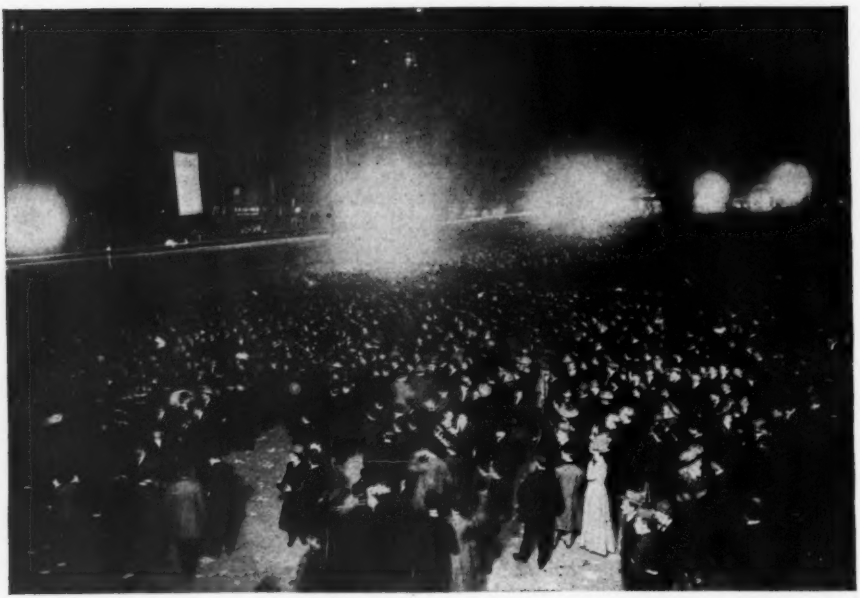
The bias of class interest would also be a factor in deciding many such questions. The inflamed discussions we have had for several years respecting injunctions against strikes show how heated would be the campaign and how far from a judicial temper the minds of the voters would get if a statute on that subject had been held invalid by the courts and was submitted to popular vote. Conflicting interests of classes would be raised also by any statute regulating the price of foods, as the issue would be largely between the cities and the country. Indeed, it is probable that few decisions on constitutional questions would stir up the public sufficiently to compel a review by popular vote except those which materially affect the special interests of some large class of voters. On all such issues involving the clashing interests of employers and employed, or producers and consumers, we can easily imagine how much of the impartial and judicial spirit would be preserved by the partisans.

The lessons either of the past or of the present do not teach that the mass of the people can very safely be trusted to do justice in a judicial capacity. It was the populace that compelled a reversal of the just decision of Pontius Pilate in the case of Jesus of Nazareth. It was by popular vote that Aristides, the pre-eminently just man of Athens, was banished. History is full of similar, if less famous, incidents in which the people have unjustly condemned and in many cases put to death the best men of the time and their own best friends. Even in America, and in the twentieth century, our press tells us with appalling frequency of lawless and fiendish vengeance wrought by mobs upon alleged criminals, and not infrequently the victim is afterwards proved innocent. In disputes between employers and employees the judicial spirit too often is overwhelmed by violent passion. Even a mere dispute about the rate of fare from New York to Coney island a few years ago developed a kind of private war in which men of much standing took part while the question was pending in the courts. In the recent public controversy over the claims of Commander Peary and Dr. Cook with respect to the discovery of the North Pole, scarcely a newspaper or citizen seemed to escape the influence of violent partisanship. Impassioned argument filled the newspapers and the air. Positive convictions were adopted by multitudes of men and women without evidence enough to justify anything more than a tentative opinion on either side. Dr. Cook would probably have had three quarters of the votes on a popular election taken at the height of that controversy. Equally exciting and far more disgraceful was the Schley-Sampson controversy. Each of these illustrious men, who deserved high honors from the nation, was attacked by self-constituted newspaper champions of the other in despicable and malignant fashion. The citizens generally took sides. A popular vote on the dispute at

that time, whatever the result might have been, would have been intensely partisan. In the late McNamara case, fortunately ended by a confession of guilt, partisan feeling rose so high that, in the absence of a confession, several million people would have believed, no matter how strong the proofs might have been, that any verdict of guilty was the result of an iniquitous conspiracy.

This country has reached a level of civilization higher than that of any nation of the past. The brain and heart of the American people are sound. But the weaknesses of human nature have not disappeared. It is not yet true that the people in the mass can as judges be equal in their intelligence, character, and impartiality to men especially chosen to decide questions of justice because of their eminent fitness for judicial service. Even if they were, they would not know all about the disputed or intricate factors of a great problem by mere intuition, nor could they distil any clear and adequate knowledge of them from the swirling and turbid controversies of a campaign.

Burdett A. Rich



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WATCHING ELECTION RETURNS ON OUTDOOR BULLETIN IN NEW YORK CITY

Equal Suffrage

BY HON. EDWARD T. TAYLOR

Member of Colorado Bar

Representative in Congress from Colorado

WOMAN suffrage simply applies to the political sphere that principle of government that secures the best results in the domestic sphere, the mutual co-operation of men and women for the individual and general welfare. It is in the line of the general elevation of the race; it represents a higher civilization; it increases the power of those things that make for righteousness.

The proof of the pudding is in the eating. Women by the hundreds of thousands are voting in Colorado, Wyoming, Utah, Idaho, Washington, California, New Zealand, Australia, Finland, and Norway. Women have municipal suffrage throughout England, Scotland, Ireland, and many of the English colonies, and I believe she now has practically full equal rights in Sweden, Iceland, and Denmark. In some of these countries the women have been voting for generations; and in all of those countries and states put together the opponents of woman suffrage have never thus far been able to find anything detrimental to the cause of woman suffrage, or even find a corporal's guard of reputable men who would publicly say that it had produced any bad results. On the other hand, thousands of the most prominent and best men in all of those states and countries have repeatedly testified unqualifiedly to the good results of woman suffrage.

I will attempt, without giving the literal quotations, to give a synopsis of what hundreds of men and women have said in public speeches or put on record in addresses or articles in various magazines. They assert, in substance, that as a result of equal suffrage fewer politicians and more good citizens are elected to office; that women are the best citizens and cannot be corrupted; that there is no bribery and no corruption of women's votes at any election; that no campaign orator in a stump speech ever dares to tell a story that is not clean; that no candidate dares cater to the immoral-woman vote; that no party dares nominate a candidate of known bad morals; and that every party in determining and selecting its candidates is compelled to, and does, select men against the character of whom the women can say nothing. They unite in saying that woman suffrage purifies the body politic; that the moral, educational, and human legislation desired by women can be secured more easily if the women vote; that the ballot leads to fair treatment of women in public service; that it is the quickest, easiest, and most dignified and least conspicuous way of influencing public affairs; that the ballot is a great educator, and that the women become more practical and more wise by using it; that instead of women's influence being lessened by the ballot, it is greatly increased; that in states where women vote there is far better enforcement of the laws which protect working girls; that they have never known an instance where the use of the ballot has caused a woman to lose her womanliness or neglect her home or her family; that there is no just cause or basis for political inequality between men and women; and that, tested by ac-

tual experience, equal suffrage means better laws, better candidates, better government, and consequently a better society.

Governor John F. Shafroth, of Colorado, says:

"Women's presence in politics has introduced an independent element which compels better nominations. It has been a great success in Colorado. Women will always be found upon the moral side of every question. It cannot be that our mothers, sisters, and wives would have anything but an elevating influence on government."

HON. EDWARD T. TAYLOR

Governor Joseph M. Carey, of Wyoming has issued a public statement within the last thirty days, in which he says:

"Women [in Wyoming] exercises her right to vote and hold office as a matter of course. I am satisfied that women's influence in political matters has been good. I know it has been a great advantage to women, as girls in schools and in young womanhood make preparations to hold positions of responsibility in civil as well as in official life. Not 2 per cent of the voters would deprive woman of her rights in this state. Within the last few years I have been more strongly impressed that it is right that women should vote and hold office, because of the fact that many women have come into very important and responsible positions."

Ex-Governor Hunt, of Idaho, says:

"The woman vote has compelled not only state conventions, but, more particularly, county conventions of both parties to select the cleanest and best material for public office."

Judge Ben Lindsey, of Denver, says:

"One of the greatest advantages of woman suffrage is the fear on the part of the machine politician to name men of immoral character. While many bad men have been elected in spite of woman suffrage, they have not been elected because of woman suffrage. If the women alone had a vote, it would result in a class of men in public office whose character for morality, honesty, and courage would be of a much higher order."

He further says:

"We have in Colorado the most advanced laws of any state in the Union for the care and protection of the home and the children. These laws, in my opinion, would not exist at this time if it were not for the powerful influence of woman suffrage."

He also states that the juvenile court in the city of Denver would not be in existence, and that even if it was, he would not be its judge, if it had not been for the woman vote. Both party organizations have been against him for years, and he has been nominated upon independent or citizens' tickets and elected by the women by overwhelming majorities.

It is universally conceded among all those who are in position to know that equal suffrage has raised new standards of public service, of political morality, and of official honesty. . . .

Antiquated Objections.

In referring to the arguments of the opposition to equal rights in this country, an eloquent senator once said:

"We find only the same ancient footprints, the same things that satisfied men thousands of years ago and which never did satisfy any woman that we know of."

Wendell Phillips, in October, 1851, in

his eloquent and celebrated lecture, answered all of the arguments against woman suffrage that I have ever heard of, and time has conclusively corroborated the correctness of what he said.

All the old objections have been swept into oblivion by modern experiences, and people who repeat them are mostly inexcusably ignorant or merely obstinate. Specious objections, slurs, and coarse laughter are no longer arguments. But unfortunately in no society has life ever been completely controlled by reason, but mainly by instinct, habits, and customs growing out of it. The race has suffered much through the tyranny of prejudice. The human family has been burdened during all the ages by common prejudice and much ignorance. Many people do not keep pace with the movement of the world about them.

St. Paul's command that women be in subjection, keep silent, and learn wisdom from their husbands, has long since lost its authority. The old assertion that women should not vote, because they have not as much brains as the men, was accepted as a conclusive argument for some time after the stone age, but people do not waste much time considering it now. In fact, the human race has developed too much at the present time to countenance *dilettante* speculation and nice theories about women's sphere, and the female intellect, and the duties of wife and mother, which are contrary to everyday common sense.

It is probably a waste of time to argue against prejudices that are unreasonable and cannot be reasoned down. Some people will harbor their biased and prejudiced notions until they cross the great divide. The woman's success in all the fields in which she has been allowed to enter constitutes a solid phalanx of thousands of indisputable facts which demonstrate her capacity and merit, and we must appeal to the reasoning and thinking people to determine this question.

Someone has said in substance that theories are thin and unsubstantial air against the solid facts of women mingling with honor and profit in the various professions and industrial pursuits of life.

When I think of the 7,000,000 wage-earning women and girls in this country, I often wish I had the time to write a volume on equal suffrage. I would entitle it, "Seven Million Reasons for the Enfranchisement of Women." In view of my actual experience and personal knowledge of the effect of woman suffrage, I have never yet seen or heard an argument against woman suffrage that had in it what seemed to me any justice or common sense. To us men of Colorado, people's prejudice against the woman's vote is incomprehensible. But when we think of it, we realize that it is due partially to lack of information of the evolution, the actual scheme of civilized life, and to the changed conditions of the present day, and also to a more or less inherited masculine repugnance to women having any public capacity or recognition whatever. While in one sense that sentiment of men may be called chivalrous, yet, in another sense it is extremely selfish. It is not chivalrous nor even honest to be willing to permit a woman forever to do exactly the same labor as a man and only receive from one third to one half of the pay for it.

Did you ever stop to think that none of the anti-suffragists have ever come out to the states where we have equal suffrage and endeavored to show our women and men the error of their way? There is a very good reason why they never do. The archæan objections and medieval arguments that they are still using in other parts of the country have been so conclusively discredited and shown by our actual experience to be ridiculous, that no one in our country would listen to them for a moment. We do not mean to be discourteous to anyone.

Everyone has a right to his or her own opinion, but when objections are diametrically opposed to what we know are the facts and are everyday common experiences we cannot resist looking upon people who shut their eyes to these conditions, as either lacking candor or as being mental relics of former generations. In future years we will look back and marvel at the supreme effrontery of the male population arrogating to them-

selves all the wisdom, honesty, and patriotism for so many generations after generations. Posterity will be amazed when it reads the history of the many centuries that women were disfranchised.

The Power of the Ballot.

Samuel Gompers, president of the American Federation of Labor, says:

"I am for unqualified woman suffrage as a matter of human justice."

Jane Addams says that her strongest reason for wishing women to vote is because she has seen and deplored the unfortunate effect upon the character of women of the indirect method of persuasion and cajolery which their present voteless condition compels them to use in their rarely successful endeavor to secure the legislation of which they and their children are so sorely in need. For their own sake women must vote.

Ex-Governor Charles S. Thomas, of Colorado, says:

"To the bread-winning portion of the female sex the ballot is a boon. She is a factor whose power must be respected. Like her brother, she must be reckoned with at the polls. Hence it is her buckler against industrial wrongs, her protection against the constant tendency to reduce her wages because of helplessness. If no other reason existed for conferring this right upon womankind, this, to the man of justice, should be all sufficient. Whoever accepts the doctrine of the Declaration of Independence must believe in the right of woman to vote."

Without quoting further extracts I will give a brief symposium of a collection of articles by various writers and a synopsis of many speeches that accord with my judgment and experience upon this subject.

Our government is controlled by politicians, and politicians are controlled by the ballot. While indirect influence has accomplished a great deal, nevertheless we know that it is a wholly inadequate substitute for the actual power of the ballot. Legislators and public officials everywhere give very little heed to any demands that are not backed by the ballot. When the women are enfranchised they not only have a voice in the making of the laws, but they are in a position to enforce them. They can make or unmake the officials who refuse to perform their duty. We in Colorado know that it is simply absurd to assert that women who vote cannot get what they wish much more easy and in a far more dignified way than the women who do not vote. We know that "virtual representation" is a delusion,—it does not exist. We know that the ballot is the right protective of all rights.

We all remember that about a year ago an Italian woman, Angelino Napoletino, was sentenced to be hung in Canada for having killed her husband after much brutal treatment from him, including an attempt to compel her to become a white slave. Owing to the aroused public sentiment throughout the United States and Canada her sentence was finally commuted to imprisonment for life.

In Leadville, Colorado, within the past year, a woman was arrested for identically the same crime and under almost exactly the same circumstances. She was poor, ignorant, and friendless. In her cell she wondered to herself whether the authorities would hang her then or wait until her babe was born. When her case was called in court the district attorney arose and said: "The public sentiment of Colorado will not condone me in prosecuting a woman under such circumstances;" and she went free. We have capital punishment in Colorado, only applicable, however, to the most heinous cases. But the conscience of the state would not permit the hanging, or even the imprisonment, of a woman for killing her husband in defending her own life and honor.

The first right the first woman on this earth started to secure was the right to know, and she has been working for thousands of years for the right to learn and work, and she is now seeking the right to control her own property, her own mind, and her own welfare. Her long years of struggle for equal rights are now culminating in a world-wide demand for equal suffrage for women, because there are no rights, either natural, social, or individual, that can be permanently maintained either politically or in the courts at law save by the possession of political rights. . . .

WOMAN WATCHER AT THE POLLS ON ELECTION DAY

The right to vote commands recognition from all political parties and representatives, which nonvoters never receive.

We will never obtain our highest ideals of citizenship until free men and free women work together for the establishment of the highest human justice.

Equal Suffrage Protects Laboring Women.

The status of women in this country has been and is now passing through a marvelous transformation. It is only a few years since it would have been looked upon as almost disreputable for a woman to work in a store or as a clerk in an office. That situation has entirely changed. If our social conditions could be perfectly ideal; if every girl when she reaches the age of discretion could be happily married to some man who would support her as he should and properly care for the family, the question of woman suffrage would be of much less concern. But to-day one fifth of all the women of this country are compelled to earn their own living by their daily labor. Nearly 7,000,000 women are wage earners to-day, and the number is constantly increasing. Woman suffrage is not responsible for bringing about that condition. It is the economic change that is going on in the life of this Republic. If the right to vote was taken away from the laboring men of this country to-morrow, they would within one year, and in many places within one week, be reduced to a condition of practical slavery; and it is little less than inhuman to compel the 7,000,000 women to work in this country under conditions that would be absolutely intolerable for men. I look upon this as a matter of common humanity. No class of human beings can compel or will ever secure fair treatment either in the courts or any other place unless that class is given the power of the ballot. If the right of franchise is as important almost as life and death to men, why is it not equally important to women? If the laboring man's vote can enforce fair treatment, labor legislation, and decent rules, at least comparatively so, why would not it produce the same effect in the hands of women? It cer-

tainly appears to me that every fair-minded man in this country, every man who is in favor of a square deal and of fair treatment to his fellow man, and especially to the womanhoood of the country, ought to heartily join in giving the women this right. If any of them do not want to exercise it, they need not do so. They are like children who do not want to go to school. They usually grow up to appreciate the importance of it, and these good ladies will reach that stage some day. There will be enough of them who do need the ballot and will honestly exercise it to creditably represent all of them. . . .

The most important subject, in fact, the greatest problem, before humanity to-day is—

The Conservation of the Human Race.

The conservation of motherhood and childhood. Where married women are forced to work in factories the birth rate decreases and the death rate of children increases alarmingly. Many kinds of work as now performed by women is injurious, and the demand for more protective legislation for women workers is constantly increasing. The handicap against woman is too great for her to bear. Woman is now compelled to work under conditions that ruin her nervous system, undermine her strength, and unfit her for the duties of marriage and motherhood. The result is it discourages marriage, which is unquestionably an alarming evil. Women are compelled to undercut wages.

No man is free unless he has the fullest rights of citizenship, independent of all limitations. The right to vote is the highest test of liberty.

If men were superhuman, the interests of women might be sufficiently represented by men, and the horrors of the sweatshops would be largely if not entirely removed.

The late Honorable Carroll D. Wright, while still national commissioner of labor, said:

"The lack of direct political influence constitutes a powerful reason why women's wages have been kept at a minimum."

Thousands of women are to-day working at starvation wages, and the conditions of women's work are getting steadily worse, instead of better, as the number of women workers increases. Anyone who will study the recent investigations of women's work and wages will painfully realize that working women, even in the United States, where there are fewer women and more favorable conditions for women workers than anywhere else in the world, except Australia, need all the help the ballot will give them. In fact, women, even more than men, need the ballot to protect their special interests and right to earn a living. . . .

I had supposed that people had ceased to dispute—

The Abstract Right of Equal Suffrage.

Natural justice is all on the side of women. If all people should take part in government; if women are people; if mankind are and of right ought to be free and equal, in the sense that they are equally "entitled to life, liberty, and the pursuit of happiness;" if all human beings are equally entitled to protection before the law; if, as Lincoln said, "No man is good enough to govern another without that other man's consent;" if "taxation without representation is tyranny;" if our government is founded upon the doctrine of "equal rights to all and special privileges to none;" in other words, if we believe in the principles enunciated in the Declaration of Independence, surely we cannot admit that any class of human beings has a right to the exclusive usurpation of these powers and rights, or that these universal principles of eternal right can be justly denied to any intelligent human being merely on account of sex.

Edward T. Taylor.

The Public Defender and What He Has Accomplished in Oklahoma

BY DR. J. H. STOLPER

The Public Defender of the State of Oklahoma

THIS office has received frequent requests from different newspapers and periodicals for a statement: 1st. What is the office of the public defender of the state of Oklahoma? 2d. What has been accomplished by the public defender of the state of Oklahoma?

To answer all of the inquiries that come from the different sources would tax the facilities of this office, and at the same time would have the appearance more of self-advertising than of giving the world the true facts, which might serve as a lesson for other states and jurisdictions to follow; and it is therefore deemed best to give a statement to the legal profession, the cordial attention and criticism of which is invited, to what is one of the most serious innovations in the administration of justice.

The public defender of the state of Oklahoma is a new office; of which office the writer has the honor of being the first incumbent. The establishment of the office of the public defender marks the fourth great step or stage in the administration of justice among men.

Without entering into a historical statement of the development of law and the different systems of administration of justice, for the purpose of this paper I will divide the development of the administration of justice in four stages; these stages being considered solely from the view of the development of the realization of the state's responsibility towards the administration of justice among its citizens or subjects.

1. The history of law shows that the first effort in the administration of justice was a private and individual one; the next of kin or the avenger of the blood taking the wrong into his own hands, and administering justice by revenge, by following up the wrongdoer and punishing the wrongdoer himself without intervention of the state.

2. The next and second stage is that period where the state or sovereign realizes the duty of the sovereign to see that justice is done among the citizens or subjects, and the state or sovereign designates certain state functionaries to act as judges; as we have in the early English courts, where both sides argue their own causes, the aggrieved side prosecuting and the other side defending its cause.

3. The third and the one in common use everywhere to-day and the more advanced stage, is that period in the administration of justice especially of the criminal law, where the state or sovereign realizes that any injury done to the individual citizen is also an injury done to the state. And therefore the aggrieved side, as represented by the private citizen, becomes merely the prosecuting witness in the case; and the cause is prosecuted in the name and by the authority of the state by a special functionary, the public prosecutor.

4. The fourth and the highest development of men's realization of the duty of the state or sovereign towards its citizenship in seeing that fair and equal justice is administered to all has found the well-known expression in the criminal law, "that it is better that many a guilty one should escape punishment than that an innocent person should be convicted."

The criminal law especially has thrown every safeguard around the innocent man that men's philosophy could devise to protect the innocent defendant from unjust conviction,—so much so that we have the well-established maxim of criminal law, "that every person is presumed to be innocent until he is found guilty." And the criminal law of every jurisdiction in the Anglo-Saxon countries gives the defendant the benefit of every doubt in his favor.

In a very able address delivered by Mr. Samuel Untermyer, before the American Academy of Political and Social Science, Mr. Untermyer makes the following pertinent inquiry: "The state has its public prosecutor; why not its public defender to care for those who are unable to defend themselves? It is quite as much to the interest of the state to rescue the innocent as to punish the guilty. The most helpless and unfortunate of all our citizens should not be forced to go virtually undefended." That the state has a duty towards those who cannot make their own defense; when the state, with all of the power at its disposal, stretches out its mighty arm and brings the person of the defendant to the bar of justice to answer to any accusation made by the state, the state, as *parens patriæ*, owes it to itself and to the defendant, when he is unable to make his own defense, to give him every assistance to properly defend himself. This is such a world-wide and well-recognized duty of the state that nearly every jurisdiction provides that where a defendant has no counsel, the court should assign counsel to the defendant.

DR. J. H. STOLPER.

Unfortunately it is the experience of all who have had any experience at all with the administration of the criminal law in the United States, that men who are properly qualified to represent the defendant before the bar of justice are very seldom appointed or assigned as counsel for a poor defendant, for the reason that the courts realize that such men cannot afford to give their time to a long drawn out criminal case for the nominal fee, which is usually $25, little more or less, that is paid assigned counsel in criminal cases. Hence the courts usually appoint young men who have had little experience with the different winding ways of the criminal law. The natural consequences in such cases is that a large percentage of men who come to the bar of justice, knowing that they are innocent, very often upon the advice of their assigned counsel, and sometimes, in spite of his counsel plead guilty, like the Kentucky prisoner, who was accused of violating the revenue laws of the United States, and, being told by the court that he had been assigned counsel, looked into the face of the well-dressed young fellow on whose law school diploma the ink had not as yet had time to dry; then again looked into the face of the experienced veteran, the United States district attorney,—turned his face to the court and said, "Your Honor, if this young fellow is my defender, I plead guilty."

In the Oklahoma state prisons, of which the commissioner of charities and corrections of the state of Oklahoma has an inquisitorial jurisdiction, it has been found by an actual examination of the

prisoners that a large percentage of prisoners, forming over 1,200 convict population, something over 40 per cent, have been sentenced upon a plea of guilty. In the majority of these cases the convicts claim that they were innocent, but that they were too poor to retain their own counsel, and were advised by assigned counsel to rather plead guilty than to take the chance of standing trial. This experience, with other experiences, of which we will speak later, led the commissioner of charities and corrections of the state of Oklahoma, Miss Kate Barnard, with her able assistant, Hobart Huson, to recommend and to work for the appointment of a public defender, to all those of the citizens of the state of Oklahoma who, by either tender age, ignorance, poverty, or by virtue of being imprisoned, have not the knowledge nor the means to prepare their own defense nor to retain proper counsel.

History of Creation of Office.

The office of the public defender of the state of Oklahoma is a new creation. The law creating the office of the public defender of the state of Oklahoma, like every true and great reform that has ever been proposed by a small brave minority, has met with a desperate opposition at the hands of those who fear the potentialities of the new proposed reform. And for a while it looked very much like the act creating the office of the public defender would go into those great archives where many a cherished hope that has never seen realization has gone, and which is usually called "oblivion." But, as it has been said, "The ways of God are full of providences." And, when the enemies of the act creating the office of the public defender of the state of Oklahoma seemed to be strongest, when the governor of the state of Oklahoma, whose signature means either life or death of an act of the legislature, publicly announced that he would veto the act creating the office of the public defender of the state of Oklahoma, the Constitution of the state of Oklahoma itself intervened, and, as will appear here below, saved the life and the existence of the act creating the office of the public defender of the state of Oklahoma in spite of terrific opposition, and gave to the state of Oklahoma, and to the United States, the honor which will forever remain to the glory of Oklahoma, that the latter through an act that does not yet accomplish all that is desired to be accomplished by a public defender, has established the principle, and is the first state to put on the statute books the fact that a body of citizens of Oklahoma realize and are willing to meet the state's responsibility to the helpless defendant; and a patriotic legislature, with the assistance of a patriotic commissioner of charities and corrections, enacted and gave to the state the first public defender as a state functionary, which action, judging from results obtained in this office, is bound to be followed by other states and other jurisdictions.

The history of the creation of the office of the public defender of the state of Oklahoma is the history of struggle, and is similar to the history of every great reform that has been obtained for the benefit of mankind. It was violently fought by its opponents; and its fate today is yet in the balance. To have a clear conception of what led up to the creation of the public defender of the state of Oklahoma, it is necessary to have in view the peculiar conditions existing in Oklahoma.

Due to the fact that Oklahoma was, territorially, at one time the Indian country, and that the land and the benefits derived from such land was held by the Indian tribes in severalty for the common use of the tribe, the peculiar condition exists to-day in the state of Oklahoma, that minor children have lands and personal estates absolutely apart from their parents, and in their own rights, which have been obtained direct from the Federal government, acting as guardian for the Indians; and therefore it has been demonstrated in Oklahoma that where so many minors have separate estates, independently from their parents, that there will be, as there are at all times, unscrupulous people that will not hesitate to take advantage of the minors' ignorance.

The constitutional convention that met and framed the Constitution of the state

of Oklahoma provided in the executive department of the state of Oklahoma a constitutional officer, known as the commissioner of charities and corrections of the state of Oklahoma.

The commissioner of charities and corrections of the state of Oklahoma is, by the Constitution and the laws made in pursuance thereof, charged with the state's duties and privileges to supervise and inspect all charitable and correctional institutions in the state, and is also made by law "next of friend" for all orphan children in the state, and dependents, delinquents, and defectives, maintained in any public institution of the state of Oklahoma.

Oklahoma was fortunate in that the first and second commissioner of charities and corrections of the state of Oklahoma was a young woman, Miss Kate Barnard, a very enthusiastic person and very much in sympathy with her work, and who has had the good judgment and fortune to select as her assistant commissioner, an enthusiastic and one of the most capable men in the state, Hobart Huson.

As "next of friend" for the class of citizens hereabove named, it became the duty of the commissioner of charities and corrections of the state of Oklahoma to appear in the various courts for the purpose of protecting the interest of the minors, and it soon became evident that a special officer would be necessary to deal with this peculiar condition existing in Oklahoma.

Oklahoma has been unjustly charged with many things. One of these charges is that the Oklahoma white man takes advantage of the Indian, and through unfair means, takes away the land from the Indian. This in the majority of the cases is not true; for in the experience of this office it has been demonstrated time and time again, that in many cases where an unfair advantage has been taken of the Indian, the men carrying out said unfair transaction were citizens of other states. As an example, I have in view a case, Re Tucker, No. 555, in the Tulsa county court, where two orphan children were defrauded of their entire patrimony, and in which the participants were a man from Ohio, a man from Illinois, and a man from the state of Indiana. The only citizens of Oklahoma that were involved in this case were the Indian minors and their father, an ignorant Indian. And after long drawn out litigation this office was enabled to recover and restore the property to the orphan Indian minors without any effort or cost to said minors.

Again, in the experience of the commissioner and assistant commissioner of charities and corrections in the supervision and inspection of penal institutions, it has been shown that a large percentage of the convicts in the Oklahoma state prisons, who were sentenced upon a plea of guilty, advised to make such plea by counsel assigned by the courts; and in the administration of the juvenile court law of Oklahoma, it became evident that the children, and the prisoners, and many of the citizens of Oklahoma, who have not the means to prepare their own causes, need the help of the state to prepare their causes.

While the above experience was being gained by the newly created department of charities and corrections of the state of Oklahoma, the second legislature of Oklahoma, in 1909, upon the recommendation of the commissioner of charities and corrections, created the office of inspector in said department. The writer was at that time recovering from a very serious illness, which prevented his resuming his own practice for the time being, and it was more in a humorous spirit that the writer accepted the offer of Miss Kate Barnard to act as inspector of charities and corrections at a salary of $100 per month. The work soon became so interesting, and it soon became evident that it was of such importance, that the nominal salary was entirely lost sight of; and the new inspector demonstrated that there is a wide field for a lawyer in the department of charities and corrections, in carrying out the jurisdiction imposed by the Constitution and the laws of the state, upon the commissioner of charities and corrections.

The work became so interesting that by the latter part of 1910 the writer, finding himself without means to defray the expense of his office, actually shouldered the burden of such expense him-

self, instead of asking for a double deficiency from the state legislature, for the funds available for the office were very soon exhausted. The legislature has made an appropriation for traveling expense to the extent of $75 per month, when it actually required something near $250 per month. The experience of the state inspector, together with the experience of the commissioner of charities and corrections of the state of Oklahoma, has led the commissioner to obtain the introduction of an act in the third Oklahoma state legislature creating the office of the public defender of the state of Oklahoma.

As has been stated above, the act creating the office of the public defender of the state of Oklahoma was one of the most bitterly fought acts in the state legislature. And, strange as it may seem, the very integrity and the devotion to duty of the writer was responsible for much of the opposition that the act providing for the creation of the office of the public defender of the state of Oklahoma has met with in the state legislature. The following, which appears on page 105 of the third annual report of the department of charities and corrections of the state of Oklahoma, shows where the main reason for the great opposition to the creation of the office of the public defender came from. Saith a senator in the state senate: "The reason I am opposed to the bill creating the office of the public defender is that there is a moral certainty that Miss Kate Barnard will appoint Doctor Stolper to be the public defender. Doctor Stolper is dangerous in such a place. He is a fanatic. When he goes after something he is so anxious to do his part that you can neither pull him off, coax him off, reason with him, or buy him off, or do anything with him. Such a man is too dangerous to be trusted with such powers. That is why I am against the bill." Third Annual Report, Com. Char. & Cor. 105.

The act creating the office of the public defender, known as house bill No. 419 of the Laws of 1910 and 1911, finally was passed by both houses of the legislature, and went to the governor. The parties opposing the act renewed all of their efforts, and charges were made to the governor that the bill was illegally passed; and, although such charges were ridiculous upon their face, that the department of charities and corrections of the state of Oklahoma used unfair means to obtain the passage of the act. When an act is passed in favor of large interests, it is very often that such interests do exert undue influence for the enactment of such an act; but it was an entirely new proposition when the enemies of the act creating the office of the public defender were charging that a department of the state government had used undue influence in obtaining the passage of a law that marks the most advanced step in the direction of fair and equal administration of justice, and which was and is intended to serve the best interest of that class of citizens which mostly need the state's intervention in their behalf. To demonstrate that said charges were absolutely without foundation, the speaker of the house of representatives was requested and has appointed a committee to investigate whether there was any foundation for such charges, and the committee unanimously reported that there was no foundation for such charges.

Act Creating Office.

The bill as enacted by the legislature is as follows; to wit:

Section 1.—There is hereby created the office of the public defender of the state of Oklahoma, who shall be appointed by the commissioner of charities and corrections, and who shall be a resident of this state at least three years, and be a licensed attorney by some court of record for at least five years previous to his appointment, and said public defender of the state of Oklahoma shall receive a salary of $2,500 per annum and necessary traveling expenses payable monthly from the state treasury in the same manner as all other state officers are paid.

Section 2.—The public defender of state of Oklahoma shall, when directed by the commissioner of charities and corrections, institute, prosecute, or defend

any suit or action in any court on behalf of any minor orphan, defectives, dependents, and delinquents, and shall be the legal adviser of the commissioner of charities and corrections in all such suits or actions, and shall, when directed by the commissioner of charities and corrections, represent any charitable or correctional institution in this state, and perform such other duties as the commissioner of charities and corrections may authorize.

The above act went to the governor of the state on the 6th day of March, 1911, and the governor of the state, listening to the enemies of said act, threatened that he would veto it. The receipt, signed by the governor of the state, shows conclusively that said act was received by the governor on March 6th, 1911; and the legislature of the state of Oklahoma was continuously in session until after the full working day of March 11th. Between March 6th and 1 o'clock A. M. March 12th, 1911, no Sundays and holidays intervened. The legislature before adjourning, as is usual in such cases, notified the governor that they were ready to adjourn unless he had any communication to make to them. To which his reply was that he had no other communication to make. Whereupon, long after the morning hours of Sunday, March 12th, 1911, the legislature adjourned *sine die*.

Section eleven of article 6 of the Oklahoma Constitution provides "that if any bill remains in the hands of the governor for five days while the legislature is in session, Sundays and holidays excepted, and is not returned by the governor to that house of the legislature where the bill originated, that the act becomes a law without the governor's signature, the same as if he had approved such act." As has been shown above, the act creating the office of the public defender of the state of Oklahoma remained five days in the hands of the governor while the legislature was in session, without any Sundays or holidays intervening; and was not returned by the governor to the legislature, although the governor did have the opportunity to do so; therefore in the opinion of the writer said act became a law, and is in full force and effect by virtue of § 11 of article 6 of the Oklahoma state Constitution.

The ill fate that pursued this great reform act did not end with the adjournment of the legislature; for on March 24th, 1911, thirteen days after the act became a law, the governor of the state did write upon the bill, "Disapproved, March 24, 1911." It was and is the opinion of the writer that the indorsement of the governor on the act, thirteen days after the act became a law, of the word "disapproved," was a superfluity, and did not in any way mitigate from the effectiveness or invalidate said law, and the same view has since been taken by the majority of the courts in the state of Oklahoma, and has recently been upheld by the supreme court of the state of Oklahoma, who recognized the public defender of the state of Oklahoma as such.

This is one of the instances where a good act, enacted for worthy purposes, has had all of the ill fortune that an act could possibly have had; and has been saved from total oblivion by the courage and the devotion to duty of the officers of the department of charities and corrections of the state of Oklahoma.

From the above it is seen what the office of the public defender is intended to be, and what it really is by law.

Section 1 of said act merely defines the qualifications of the public defender of the state of Oklahoma, and provides for the salary of said officer.

Section 2 of said act, among other provisions, provides "that the public defender of the state of Oklahoma shall . . . perform such other duties as the commissioner of charities and corrections may authorize." This is virtually the whole value of the act. So far as § 1 is concerned, while it provides for the salary of the public defender of the state of Oklahoma, no appropriation has been made for such purpose, due to the fact that the governor of the state threatened that he would veto the act, and said threats were made while the legislature was in session. The public defender of the state of Oklahoma, as such public defender, serves entirely without any salary or remuneration; but he is paid for his legal services out of a special

fund, provided in the department of charities and corrections just for such purpose. The whole object in putting in operation the provisions of the act creating the public defender of the state of Oklahoma was not to reflect upon the governor of the state or to make use of his disregarding § 11 of art. 6 of the Constitution; but this act was put in operation.

First, to give the world that office which today is needed more than any other office in the administration of justice,—the office of the public defender;

Second, to give to Oklahoma the honor of having the first public defender; and,

Third, for the reason that it was absolutely necessary for the successful work of the department of charities and corrections of the state of Oklahoma.

This answers the first question,—What is the office of the public defender of the state of Oklahoma?

The Work Accomplished.

The second question,—What has been accomplished by the public defender of the state of Oklahoma?—can be answered in a much shorter space than it has taken to give the history of the act creating the office of the public defender of the state of Oklahoma.

Those who have followed the different discussions in the House of Representatives of the United States will find in the congressional record remarks by Congressman Jackson, of Kansas, and Congressman Carter, of Oklahoma, where they mention the public defender of the state of Oklahoma by name, and tell the country at large that the interest of the orphan children of Oklahoma is well protected through the efforts of the commissioner of charities and corrections of the state of Oklahoma, Miss Kate Barnard, and by Doctor J. H. Stolper, the public defender.

Up to the present time we had on our books something over 4,000 cases. These cases, most of them, were probate cases, some general civil and criminal cases, misdemeanors and felonies, in the district courts, in the superior courts, in the criminal court of appeals and in the supreme court of the state of Oklahoma. And, it is with profound gratitude to the courts and jurors in the state of Oklahoma, that the public defender of the state of Oklahoma is enabled to say that not a single case represented by the public defender of the state of Oklahoma has ever been lost.

We have not entered a single plea of guilty; and, where the public defender of the state of Oklahoma does appear, it is a guarantee to the court and jury that the public defender of the state of Oklahoma represents a just cause; and, it is with profound gratitude to the judges of the Oklahoma courts that I am enabled to say that the courts have given to the public defender of the state of Oklahoma their confidence and, through a mutual respect of the courts and the public defender, work has been accomplished with rapidity, and cases have been disposed of with justice to all concerned, in such a rapid manner that a tremendous amount of time and an enormous amount of expense has been saved, both to the state and to the various litigants that this office has represented.

The available funds to carry on the legal work were very small, and the tremendous amount of labor that has been accomplished by the office of the public defender of the state of Oklahoma, with the cordial co-operation of the commissioner and the assistant commissioner of charities and corrections of the state of Oklahoma, can be seen from the fact that we have in Oklahoma 122 courts of record, to wit: Seventy-five county courts, with probate, juvenile, and a limited amount of civil and criminal jurisdiction; seven superior courts, with jurisdiction in felony, misdemeanor, and general civil jurisdiction; thirty-six district courts, with general civil and criminal jurisdiction in felony cases, and a supreme court, with two commissioner divisions, with final appellate jurisdiction in all civil matters, and a criminal court of appeals, with final and appellate jurisdiction in all criminal matters; a total of 122. And it is the duty and privilege of the public defender of the state of Oklahoma to appear in all of said courts; and, which so far he has been able to accomplish without losing a single case for want of successful efforts on the part of the public defender of the state of Oklahoma.

The effect accomplished by the office of the public defender of the state of Oklahoma makes itself felt in several ways.

First. Very often when the public defender of the state of Oklahoma appears in any cause, such cause rarely ever goes to trial, but, instead, in such cause, a peaceable and satisfactory arrangement is usually obtained that is satisfactory to all concerned.

Second. In many cases where the public defender of the state of Oklahoma appears, the other side very often concedes the contention; for, it has been the effort of the present incumbent of the office of the public defender of the state of Oklahoma to be absolutely impartial and fair to all sides in every controversy, without taking an unfair advantage of opposing litigants or counsel. In pursuance of which policy the office of the public defender of the state of Oklahoma very often informs the opposite counsel what will be the exact ground of the public defender's defense or opposition. And this leads to a meeting between all parties concerned, and very often all opposition to the side represented by the public defender usually gives way, and the expense of a trial and the loss of time is saved thereby.

Third. Again, where no satisfactory arrangement can be obtained, we usually try the case; and it has become known to all in the state that when the public defender's office undertakes to try a case, that that case will receive the very best attention, and will only terminate either with acquittal or with the final appellate court to which the case can be carried.

Fourth. Many judges, realizing the fair and impartial attitude of the public defender of the state of Oklahoma, have referred many cases for the investigation and recommendation of fact and law to the public defender, and have usually followed the recommendation made in such reports.

Fifth. The fifth, and which is the most important, is, that all classes of citizens of Oklahoma, and especially the poor and helpless, when in need of any legal help, know that they have an officer to whom they can address themselves, and who will at all times give them the very best advice that he is capable of, and use his very best efforts in their behalf should such efforts become necessary.

The major cases tried by this office are so numerous that this paper would not allow the space to mention them, and which appear in the third, and will appear in the fourth, annual report of the commissioner of charities and corrections of the state of Oklahoma. The most gratifying results are that the cost of carrying on the enormous legal work hereabove referred to will average not more than $5 per case. This is a record that, in my experience, has never been accomplished before.

In conclusion I will say, what the future fate of the office of the public defender of the state of Oklahoma will be is hard to foresee at present. With open opposition from the governor of the state, with the duties imposed upon the public defender to protect the helpless, and which often implies the punishment of the guilty, the officer must make enemies, if the person occupying the office of the public defender does his full duty. However, this is the fate of every earnest public officer. Let the future of the office take care of itself. We will perform our duty without partiality. And, if the office of the public defender does not earn the right of a place in Oklahoma, our labors will have demonstrated the usefulness and necessity for such an office. That it saves time and money, and facilitates the administration of justice; that it has resulted in winning the respect of the people of the state for the office of the public defender, and for the courts of the state; and, what is equally as important, that it has resulted in winning the confidence and respect of the judges occupying the various benches in the state, which results in the mutual respect and confidence, and assists in protecting the innocent and in bringing to speedy justice the guilty, and is one of the best remedies for the general distrust generated by certain individuals for their own personal benefit, towards the courts in the United States.

The friends of the law creating the office of the public defender of the state

of Oklahoma have anticipated much from this act. Have their anticipations been justified or not? And have their hopes been realized? To this I will allow those who are qualified to answer. I will cite a few of the many opinions that we have on file in this office that pass judgment on the labors of the public defender of the state of Oklahoma.

Some Commendations.

The generous Attorney General of the United States, Honorable George W. Wickersham, under date of March 18, 1912, in speaking of the report dealing with the labors of this office, says:

"I am struck by the scope of work that is summarized in your annual report, and with the excellent results that you have achieved in your own branch of that work."

Mr. Alexander Johnson, Secretary of the National Conference of Charities and Corrections, writes:

"May I take the liberty of offering you my most hearty congratulations on your success. Such work has never been done before, and your success must be most gratifying to you, as I assure you that it is to me and to all of your friends. You are helping the state of Oklahoma to set a great example to many of her sisters who are very lax in securing the rights of people in distress, being much more ready to give such people charity than to give them justice."

In a letter from Honorable Dana H. Kelsey, United States Indian Superintendent, the following appears:

"The prodigious energy displayed by Dr. J. H. Stolper has produced a wonderful and munificent effect. Dr. Stolper's energy, enthusiasm, and utter disregard of consequences personal to himself, demonstrates his special fitness for the work in which he is engaged."

The above letters came from men that stand always on the side of law and order, and are naturally in sympathy with everything that tends to facilitate and produce a fair administration of justice.

The following letter is reproduced here with a good deal of hesitation, due to the superlative praise that it contains for the public defender personally. Yet it has that moral value that even when this office has to take sides against anyone, it is done absolutely with scrupulous impartiality. The letter is as follows:

Miss Kate Barnard, Commissioner of Charities and Corrections, Oklahoma City, Oklahoma.

Dear Miss Kate:—

Permit me to say that Dr. J. H. Stolper, the public defender and your representative in charities and corrections, has been here and made a most complete investigation, coming within your jurisdiction as commissioner of charities and corrections. And while I have contemplated no wrong, yet it seems that I am a victim of circumstances and entanglements.

After talking the matter over with Dr. Stolper in a kind and friendly way, I gave him my resignation without any cost, expense, or trouble to the county or state. Notwithstanding this unpleasant situation, candor compels me to say that Dr. Stolper has been fair and impartial in his investigation; and, while I have found him to be determined in his undertaking, I have also found him to be a sympathetic and kind-hearted man.

The above is written by a man who occupied a high judicial position in the state, and whose resignation was demanded and received by this office. Yet it is gratifying to the public defender of the state of Oklahoma, that even the party who was compelled to resign felt that he was treated absolutely with the most scrupulous fairness and impartiality.

May the experience of Oklahoma be followed by other states, and may the office of the public defender come to be an established institution in every county in every state, just as the office of the public prosecutor is an established institution, for the general good of all who have to come in touch with the laws and administration of justice, and especially those helpless citizens who cannot defend themselves. And as long as the office of the public defender of the state of Oklahoma will be occupied by the present incumbent, the helpless citizens of Oklahoma who need the help of the public defender will not go undefended.

Dr. J. H. Stolper

The Use of Ballot Machines in Elections

BY HERBERT C. SHATTUCK

Of the New York Bar

NEXT in importance to political emancipation at the hands of a government is political participation in its affairs. Thus Holmes speaks of—

"The freeman casting with unpurchased hand,
The vote that shakes the turrets of the land."

But not every freeman can thus shake the turrets even of his own land. The right of suffrage has ever been and must ever be restricted. Every man has a right to govern justly, but it does not follow that every man has a right to be governor.[1]

However, when the limitations upon the right of suffrage have been determined, it is of supreme importance that those who are, in political theory, granted that right should, in actual practice, enjoy it to its full extent. Suffrage is the delegation of the power of an individual to some agent, the basis of representation. This being so, it is most important that every man entitled to vote may vote, and that his vote may be sent forward and counted.[2]

Methods of Voting.

There are in general only two methods of voting,—open voting or *viva voce*, and secret voting or voting by ballot.

It has been suggested that the word "ballot" comes from the Greek word "ballo" meaning "to throw." But the derivation usually given is from the French, Italian, or Spanish word meaning "a little ball," such as could be concealed in the hand and used in secret voting. Other substances have been used in this way, among them kernels of grain, coins, stones, shells, wooden rods and pieces of paper, but when so used all went by the name "ballot" for they were adapted to its purpose of secret voting. Thus, certain early colonial laws provided that freemen might vote in the affirmative by the use of a grain of corn, in the negative by putting in a bean.

The ballot is doubtless nearly as old as the practice of voting by unprotected bodies of citizens; but our first knowledge of it is in classic Greece, where the dicasts or popular courts voted by balls of stone or metal or by marked shells (ostrakoi), whence comes *ostracism* or banishment of an unpopular leader, or by olive leaves (petalism).

The Australian Ballot.

From this beginning has grown our modern system of voting, with the party ballot and its many attendant evils, and this has been replaced in many states by the so-called Australian ballot or official ballot furnished by the state. The latter allows independence of judgment and tends largely to break down the tyranny of the party boss, but in spite of these manifest advantages it is not entirely free from objection.

It has been said that the chief objection to the Australian ballot law is that the counting of the official ballots is, of necessity, a tedious and difficult process, and that information with reference to the result of an election is on this account unduly delayed.[3] Out of this difficulty has grown that modern feature

[1] Alden, Science of Government, p. 19.

[2] 6 Webster's Works, p. 221, being his argument in Luther v. Borden, 7 How. 15, 12 L. ed. 587.

[3] McCrary, Elections, § 728.

of ballot reform, the substitution for the paper ballot of voting machines, contrivances that both record and count the votes, enabling the inspectors to determine at any moment how many votes have been cast and for whom.

Purpose and Requirements of Voting Machines.

The voting machine is a mechanical Australian ballot, having for its object the correcting and preventing of the abuses to which that ballot is susceptible, and expediting the returns. It accords to each voter his full voting privilege, prevents him from making mistakes that would invalidate his ballot, makes it unnecessary for judges to inspect the ballot to determine its legality, and gives the returns at once upon the closing of the polls.

The requirements laid upon a machine to render it acceptable for use in elections are usually very rigid. The following are the common ones: It must allow voting in secret; it must be simple, convenient, and usable by blind or illiterate voters with the aid of instructions; it must afford facilities for voting for candidates of several different parties (seven in New York); it must permit voting for a full ticket of one party or part of one and part of another, or part independent candidates, but not allow voting for more candidates in all than is legal nor allow repeating; it must permit the voter to correct a mistake or change his vote while in the booth; it must allow voting on propositions; it must count positively and accurately every vote cast, and must prevent defective ballots.

Kinds of Voting Machines.

Voting machines were first devised in England, those of Vassie, Chamberlain, and Sydserff appearing in 1869, and that of Davie in 1870. In these machines, voting was by the use of balls falling into their proper compartments.

In America, there have been many different styles of machines in use from time to time. The earliest was the Myers, in which a single ballot is placed in a frame having a push knob for each candidate; the voter indicating his choice by pushing the knob opposite his candidate's name, and the machine indicating the vote upon a dial. In the Rhines machine, the names are arranged, as in the Myers, by parties and offices with a push button and separate sheet for each candidate, the voter pushing a button which places a punch in such a position for the candidate's name that when the lid of the machine is closed the next number on the proper tally sheet is punctured. In the Bardwell machine, the names are arranged in office lines and party rows, the voter being furnished with a key which he inserts in the keyhole belonging to his candidate, and turns it half way around. The McTammany machine contains on its face a slot for each office, and beneath the face is a card bearing the names of the candidates for the office seen through the slot, the voter's choice being indicated by turning a wheel until the name of his candidate appears, then pushing a knob which punctures the tally sheet. In the Dean machine, the keyboard is placed horizontally. Pushing the key exposes a cross against the name of the candidate, but the vote is not recorded until a lever is thrown which operates a dial out of view of the voter. In the Abbott machine, the names of all candidates for one office are mounted on a slide which is adjusted by the voter according to his wishes. The United States Standard machine has an upright keyboard with party columns and office lines; each party has a large lever and each candidate a small one; the voter may vote a straight party ticket by pulling the party lever, or may split his ticket as he wishes by using the small individual levers; by opening the curtain the voter registers his vote and sets the machine for the next voter. Other machines are the Universal and the Davis.

Their Introduction.

The first machine built and actually used in the United States was the Myers, which was used in Lockport, New York, in 1892. The election for the entire city of Rochester, New York, in 1898 was conducted by using seventy-three machines, and was the first complete and

convincing demonstration of their practicability when used on a large scale.

The first state law authorizing their use was passed in New York in 1892, and applied only to towns. In 1893 Massachusetts and Michigan authorized the use of machines for local elections; in 1894 New York authorized their use for all elections outside of New York and Kings counties; in 1895 their use was authorized in Michigan and Connecticut; in 1896, in Massachusetts; in 1897, in Minnesota; in 1898, in Ohio; in 1899, in Indiana and Nebraska; and later in Iowa. In 1900 Rhode Island appointed a commission to regulate their use. The first permanent state voting machine commission was created in New York in 1897, and Massachusetts and Ohio followed in 1898. In California a constitutional amendment allows voting by means other than paper ballot.

Their Advantages.

One advantage claimed from the use of voting machines is economy. Under the Australian ballot system, in close elections there was endless dispute over the legality of ballots. Wigmore in his work on the Australian Ballot points out thirteen ways of wrongly placing the X and forty-four errors in the style of it. The contest and recount expenses often exceed the cost of holding an election, and the title of candidates is sometimes held in abeyance until after the term of office has expired. With the use of the voting machine all this delay and expense are avoided. A smaller number of voting precincts is necessary and a smaller number of officers is required in each precinct, and their services are required for shorter hours. Election expenses are reduced to such an extent that the machines are said to pay for themselves in five or six elections.

Another advantage is speed. In a presidential election in New York, where presidential electors, congressmen, state officers, and county and local officers are to be voted for, the Australian ballot must be 2 or 3 feet long and, with five or six tickets in the field, approximately 18 inches wide. The voting is accordingly slow. In Buffalo, New York, where machines have been used since 1899, the returns from all of the 108 election districts, with over 60,000 voters, have been received and tabulated at the city hall in thirty-five minutes, and papers showing the results have been sold on the streets within one hour after the closing of the polls, although the ticket contained approximately 150 candidates. In that city 1,041 voted in one day on one machine.

A third advantage from the use of machines is accuracy. Under the old system, void and blank ballots often amounted to 5 per cent of the total votes cast, sometimes to as much as 40 per cent. These were often greater in number than the majority of the successful candidate. With the use of machines it is claimed that 99 per cent or more of the highest possible vote that could be registered by those who voted is registered.

Aside from these advantages, the use of the voting machine tends to greater honesty in elections, for it permits the voter to express his political preferences in absolute secrecy, with even a greater degree of secrecy than is possible with the paper ballot, although that may be marked and folded in a private booth. In the machine, the voter is alone with his conscience and his convictions. He is free from the power of previous intimidation or subsequent punishment at the hands of ward heelers or political whips. And while this may be true, in a sense, of the Australian ballot, the shrewdness of man is said at times to have encroached upon its secrecy by surprising methods, such as the use of double ballots, the one underneath showing the imprint of the marks made upon the one placed in the box, and by other means too subtle for description, but by which the voter could not entirely conceal his vote from the prying eyes of interested parties. Doubtless resort to these methods is not frequent or general, and it is to be hoped that the use of the voting machine is never objected to on the ground that it allows the voter too great a liberty,—in other words because it is too honest.

The Constitutional Question.

A constitutional question is often raised with regard to the use of voting machines when the provision is that voting shall be "by ballot." As a general proposition, their use has been upheld as within the broad meaning of that term.

Thus, it has been held that a constitutional provision that "all elections shall be by ballot," being intended to require and protect the secrecy of the ballot, with the general purpose of guarding against intimidation, securing freedom in the exercise of the elective franchise, and reducing to a minimum the incentives to bribery, is not infringed by an act authorizing the use of voting machines.[4]

The purpose of the constitutional provision requiring certain votes to be "by ballot" was simply to declare the policy of assuring to electors a secret, as distinguished from an open, or announced, vote, and not to secure a particular mode of secret voting, and is therefore not violated by a statute authorizing the use of machines.[5]

A voting machine was introduced at an election in Minneapolis in 1896, and its use was contested as in violation of the constitutional provision for elections "by ballot;" but the court was of the opinion that the Constitution should not be restrained to the strict sense of that term so long as its main purpose might be otherwise fully attained. Although the framers of the Constitution did not have in mind any such method of voting, if by the use of the machine the main purpose of the Constitution can be effectuated, if the elector may cast his ballot in secret with the assurance that it will be counted as cast, there can be no sound reason why it should be dismissed as an innovation upon the letter of the law.[6]

With the increase of population, especially in the great cities of our country, it becomes more and more important that facilities for rapid voting and canvassing the votes shall be adopted, so far as these objects can be attained without interfering with the right of franchise, the secrecy of the ballot, and the accurate counting of the votes. A machine that does not interfere with any of these objects cannot be said to contravene a constitutional provision that "all votes shall be by ballot.[7]

A constitutional provision for elections "by ballot or paper vote" is broad enough to include the use of a machine, provided that votes may be recorded for persons other than those whose names are on the official ballot; a choice may be indicated as well by the puncture of the paper as by a pencil mark.[8]

In 1901, the Massachusetts house of representatives submitted to the supreme judicial court the question whether the general court had the right to authorize the use of voting machines at elections. The Constitution required that representatives should be "chosen by written votes." Three judges replied that, although the framers of the Constitution doubtless had in mind pieces of paper with names written upon them, yet, since they meant simply to stop oral or hand voting and to secure greater certainty and permanence of a material record of each voter's act and the privacy incident to doing that act in silence, the object of the Constitution would be satisfied if the voter should make a change in a material object, for instance, by causing a wheel to revolve a fixed distance, if the material object changed were so connected with or related to a written or printed name purporting to be the name of a candidate for office, that, by the understanding of all, the making of the change expressed a vote for such candidate.

One judge agreed, but added the proviso that the action of the machine must be visible to the voter casting the vote, because of the fact that the chances of

[4] United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 119 Am. St. Rep. 539, 109 N. W. 458, 10 Ann. Cas. 972, 7 L.R.A. (N.S.) 512.

[5] Detroit v. Inspectors of Election, 139 Mich. 548, 111 Am. St. Rep. 430, 102 N. W. 1029, 5 Ann. Cas. 861, 69 L.R.A. 184.

[6] Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 9 Ann. Cas. 270, 7 L.R.A.(N.S.) 621.

[7] Lynch v. Malley, 215 Ill. 574, 74 N. E. 723, 2 Ann. Cas. 837.

[8] Re McTammany Voting Machine, 19 R. I. 729, 36 L.R.A. 547, 36 Atl. 716.

error in the work of the machine are so different from those involved in the method of voting contemplated by the Constitution, as to forbid votes cast and counted by such a machine being held to be a compliance with the Constitution.

The other three judges disagreed, upon the ground that the turn of a wheel or dial, the punching of a hole in an unseen roll of paper, by a voter who pulls a lever or turns a key, is not the use of a written vote, within the meaning of the Constitution. The Constitution contemplates that the choice of the voter shall be indicated by some kind of writing upon some material thing, and that it shall pass from his possession and control to that of election officers; that he shall have reasonable opportunity to see that it has so passed, and that it shall be distinct from that handed in by any other voter, capable of being handled, sorted, and counted, and that the ascertainment of the result shall be the personal act of the election officers.[9]

And later it was held that such a constitutional provision would be violated by the use of a machine. The machine method is entirely unlike the writing of a name of the chosen candidate upon a piece of paper and the deposit of the paper in a box. "In the use of the machine the voter must trust everything to the perfection of the mechanism. He cannot see whether it is working properly or not. This chance of error, whether greater or less than the chance that a ballot deposited in a box will not be properly counted, is very different from it."[10]

But in another jurisdiction it was said that there is no constitutional provision requiring that a voter shall have visual evidence at the time of using the machine that it correctly records and counts the ballot which he votes.[11]

Where the Constitution provides that "all elections shall be by ballot," a cardboard bearing the name of the candidate and remaining attached to the voting machine, and not passing into the control of any voter, nor, by the act of voting, into the control of the officers of the election, cannot be deemed the "ballot" of the Constitution, without paying merely mock deference to that instrument, and statutes providing for the use of such machines at elections are void.[12]

Under a statute designed to prevent voters from voting for any except members of their respective parties, and to give each candidate equal advantage with his party competitors as far as position upon the ballot is concerned, the use of a voting machine is illegal, for once in the machine, the voter may vote the ticket of any party or for any individual of any party, and by so doing defy the prohibition of the statute.[13]

A machine which cannot register a certain combination of candidates, thereby making it necessary for any voter wishing to vote for such a combination to apply to the inspector for a paper ballot, and in so doing disclose his intention not to vote for his full party ticket, does not afford an opportunity to vote a secret ballot and therefore cannot lawfully be used.[14]

The constitutionality of voting machines has also been questioned on the ground that they do not insure secrecy in that when an elector votes a "split" ticket, persons very close to the machine may at times hear a noise or "click" caused by the movements of the lever which is necessarily employed when the elector goes out of the straight party column. No claim was made in this case that such eavesdroppers could learn in that way what candidate the elector voted for, but simply that he had not voted a straight ticket, and no decision was rendered upon the point.[15]

Miscellaneous Questions.

Failure to place a proper heading upon a local option proposition in a voting ma-

[9] Re House Bill No. 1291, 178 Mass. 605, 54 L.R.A. 430, 60 N. E. 129.

[10] Nichols v. Election Comrs. (Nichols v. Minton) 196 Mass. 410, 12 L.R.A.(N.S.) 280, 124 Am. St. Rep. 568, 82 N. E. 50.

[11] Henderson v. Election Comrs. 160 Mich. 36, 124 N. W. 1105.

[12] State ex rel. Karlinger v. Deputy State Supers. 80 Ohio St. 471, 89 N. E. 33, 24 L.R.A.(N.S.) 188.

[13] Line v. Election Canvassers (Line v. Waite) 154 Mich. 329, 117 N. W. 730, 16 Ann. Cas. 248, 18 L.R.A.(N.S.) 412.

[14] Helme v. Election Comrs. 149 Mich. 390, 119 Am. St. Rep. 681, 113 N. W. 6, 12 Ann. Cas. 473.

[15] People ex rel. Deister v. Wintermute, 194 N. Y. 99, 86 N. E. 818.

chine, failure to number the propositions according to the scheme of the liquor tax law, and failure to make the instruction card correctly represent the face of the machine, are not such irregularities as to invalidate the election, especially when no voter appears to be prejudiced thereby.[16]

And in the case of voting on a proposition, the fact that the machine had the words "yes" and "no" instead of "for" and "against," as prescribed by statute, was held not to invalidate the vote, where no one was deceived thereby.[17]

Under the acts of 1900 and 1901 of Rhode Island, a town or city may change from a specific kind of voting machine to another approved by the state board, but may not change from the use of machines to the method in use prior to their adoption.[18]

In a statute providing that when a town has adopted a voting machine, it must be used by the voters of such town or any part thereof upon all questions submitted to them, the reference is to some organized division of the town, and an election to incorporate a village which includes unorganized portions of two towns is valid, although in one portion thus voting the machine is ignored and the vote is by paper ballot.[19]

The duty imposed by statute upon the inspectors in regard to the setting of the counters in a voting machine just before the beginning of the voting is purely ministerial, and therefore the manner of its performance is not reviewable by certiorari.[20]

A voter may not enjoin the use of voting machines, since such use relates to a purely political right.[21]

Nor can a voter restrain the purchase by a city or county of voting machines, on the ground that his vote will be endangered by alleged imperfections in the machines, nor on the ground that as a taxpayer he will suffer loss by being compelled to pay for an imperfect machine, when by the terms of the contract the city or county will incur no liability until, after a practical test, every element of doubt is solved in favor of the utility of the machine.[22]

"When the elector in the use of a voting machine complies with the prescribed regulations for its use so as to indicate his choice for any particular office, the vote, so far as he is concerned, is complete. The registry by the machine is simply a substitute for the canvass of written votes. That it failed to work properly cannot destroy the effect of the act of the elector in the exercise of his constitutional right. If the machine at the close of the polls, but before it could be opened, were destroyed by accident or design, this should not render the election nugatory. Doubtless it would make the ascertainment of the vote cast a work of great difficulty, but the difficulty of the inquiry would be no valid objection to entering upon it." [23]

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[16] Re Merow, 112 App. Div. 562, 99 N. Y. Supp. 9.

[17] People ex rel. Williams v. Board of Canvassers, 105 App. Div. 197, 94 N. Y. Supp. 996, affirmed in 183 N. Y. 538, 76 N. E. 1116.

[18] Re McTammany Voting Machine, 23 R. I. 630, 50 Atl. 265.

[19] Re Taylor, 150 N. Y. 242, 44 N. E. 790.

[20] Re Many, 10 App. Div. 451, 41 N. Y. Supp. 993.

[21] United States Standard Voting Mach. Co. v. Hobson, 132 Iowa 38, 7 L.R.A.(N.S.) 512, 119 Am. St. Rep. 539, 109 N. W. 458, 10 Ann. Cas. 972.

[22] Shoemaker v. Des Moines, 129 Iowa, 244, 3 L.R.A.(N.S.) 382, 105 N. W. 520.

[23] People ex rel. Deister v. Wintermute, 194 N. Y. 99, 86 N. E. 818.

Evils of the General Ticket System

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IT is an elementary truth, both in the world of nature and in the domain of mechanism, that a part or organ that has become functionless is not only useless, but actually dangerous. This truth is applicable to our system of choosing presidential electors. In a book entitled "The Electoral System of the United States," published shortly after Mr. Roosevelt's inauguration as President, I endeavored to explain the perils to our national existence involved in the system. Some arise from the improper selection of the electors: Thus, repeatedly have electors ineligible under the nation's organic law been chosen; electors have been voted for on the wrong day; and in 1857 the electoral college in Wisconsin convened on the wrong day because a violent snow storm prevented a meeting on the prescribed day. Even were there no danger of the appointment of ineligible electors or of their assembling upon the wrong day, no danger that their appointment might be vitiated because they were voted for on the wrong day, no danger in the death or resignation of an elector,—there would, as the nation has more than once discovered, still be great peril in the language of the Constitution respecting the electoral count. In 1887—ten years after the disputed Hayes-Tilden election—Congress passed a law to govern the electoral count, but, as many statesmen have declared, the law is defective; it does not meet the real danger. The weaknesses in our electoral system have many times been pointed out; predictions of trouble have repeatedly been made. Inasmuch as the electoral college has become a useless piece of mechanism, it ought to be abandoned. It is positively dangerous. The whole system needs remodeling, and adequate remedy can only be had by constitutional amendment.

This opinion has been many times expressed by some of America's ablest statesmen. It was the view of Benton, Morton, Ingalls, Dawes, and Evarts. It is the opinion of many statesmen of today. The quarrels over electors in different states are giving point and emphasis to it; nor is it beyond the bounds of probability that the coming election may see the end of the entire system.

By an extraconstitutional process the country has adopted what is known as the general ticket system. This is virtually a system of election by states. Electors are chosen over the whole state, and the whole electoral weight of the state is thrown into the scale for the successful candidate. This has a tendency to magnify the importance of large states and to destroy the influence of the small ones. It stifles minority opinion in states usually dominated by one party. It lends itself easily to fraud and corruption. The evils of the system have been condemned ever since its general adoption in 1832.

Election by House of Representatives.

There are, moreover, grave perils in the election of a President by the House of Representatives. The first election in that House, which was in 1801, compelled the passage of the 12th Amendment. The second election in the House, which took place in 1825 and gave the

office to a minority candidate, led to a determined, although unsuccessful, effort to get rid of the general ticket system. The House elected John Quincy Adams, who had received only 88 electoral votes out of a total of 261 electoral votes. Adams won because he had 13 states against 7 for Jackson and 4 for Crawford. If the election should go into the House next February it might constitutionally choose that one of the three leading candidates who had the smallest electoral vote. Again, 17 states would suffice to insure an election in the House, and these might be the smallest and least populous states.

Faults of Electoral System.

Although warned from the outset of the present government against the faults and evils of the electoral system, although in our saner moments, conscious of the danger to our institutions in a dispute about the accession to the presidency, we act as though we were sailing through smooth political waters and might not be approaching dangerous rapids or a cataract. I do not purpose to describe the perils in the electoral system, or the dangers in the inscrutable language of the Constitution which declares that, when the certificates from the several states containing the electoral votes are opened in the joint presence of the Senate and the House of Representatives, "the votes shall then be counted," —language that does not say by whom the count shall be made. Nor shall I consider whether the act of 1887 furnishes a solution of the vexatious questions that might arise over a disputed count. Nor shall I enter the interesting domain of speculation as to the probable outcome this fall, if no candidate should have a majority of the electoral votes, and the House should fail to elect a President. I wish to call attention to the dangers in the general ticket system, dangers which every patriotic citizen must wish to see ended, dangers which threaten the continuance of the government; for if the presidency should become the subject of barter and sale, the life of the Republic would be short.

Bribery of Voters.

Public attention has recently been concentrated upon the grave charges regarding contributions by great corporations in the presidential campaign of 1904. The Senate recently passed a resolution for an investigation of these charges. At the time when this article is presented by CASE AND COMMENT to its readers, that investigation may be exciting public attention. Fraud in the purchase of delegates to national conventions is an evil from which relief may be hoped when some general primary law is enacted for the selection of delegates. The moneys contributed by the vast trusts and corporate combinations in presidential campaigns have not been used in the purchase of delegates, but of voters at the general election. Corruption has been concentrated in states in which a slight change in the vote would swing the state from one party column to another. That is possible only under the general ticket system. The general ticket system is the most perfect mechanism that could well be devised to make the bribery of voters effective. It gives free play to the evil disposition of those who would make the presidency the subject of barter and sale. A few words as to its development.

Selection of Electors.

There is no warrant for it in the Constitution. The Constitution provides:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

This is all the Constitution has to say about the selection of electors. That the electoral colleges shall meet and ballot in their respective states; that they shall prepare lists showing how they have voted, which shall be transmitted to the Federal capital and opened in a session of the two Houses of Congress by the President of the Senate; that the votes shall then be counted; that the person having the greatest number of electoral

votes, if it be a majority, shall be President; that if there be no such person, the voting shall take place in the House of Representatives and by states,—are all now provided in the 12th Amendment.

The Constitution gives the legislature of each state autocratic power in the appointment of electors. No state constitution may interfere with this prerogative of the legislature. As illustrating the plenary authority of the legislature it may, as has been said, appoint electors itself, or vest such appointment in "a board of bank directors, a turnpike corporation, or a synagogue." In early days the methods of appointment of electors were various. In a number of states the legislature itself chose electors. In other states, election was had in districts equal in number to the number of Representatives to which the state was entitled in Congress. In the first election in two states only were electors chosen by general ticket. The right of the state legislature to appoint electors in any manner it pleases is clear from the language of the Constitution, and was decided by the Supreme Court of the United States in McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3. In that case the Supreme Court upheld an act of the Michigan legislature for the election of an elector of President and Vice President in each congressional district of the state and of two electors at large, one to be chosen in an eastern district, and the other in a western district, of the state. The word "appoint," said the Court, "was manifestly used as conveying the broadest power of determination. . . . The appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States." No state, said the Court, could circumscribe the legislative power to appoint, for that was conferred by the United States Constitution.

General Ticket System.

About 1832, when national conventions for the nomination of candidates for President and Vice President came into being, the general ticket system also became almost universal. It was not adopted to give fair play; it was the offspring of policy. It enabled the leading political figures in a state to consolidate and control its vote. It is easy to understand how, under this plan, the state leaders, who could control the entire vote of the state, became extremely influential in the commonwealth, and where the state was an important factor in the success of the national party, these leaders would become national figures. The electoral vote of the state was scattered under the district system, while it would be concentrated under the general ticket or unit system. States in which the legislature directly appointed electors, or in which the district system prevailed, were one after another forced to adopt the general ticket system or be placed at a disadvantage. Party strength was broken in the states in which the district system prevailed, whereas under the general ticket system all the electoral vote of the state was counted for the successful party, however narrow the margin of its success. In the Congress of 1823, in which it was foreseen that the ensuing presidential election would probably be thrown into the House of Representatives, a powerful effort was made to abolish the general ticket system by constitutional amendment.

The general ticket plan was vigorously criticized and violently assailed by many leading congressmen of the day; in fact, the arguments against it have never been met. The discussion in the House of Representatives which had run through several sessions culminated on April 1, 1826, in a vote in which the resolution to establish the district system on a constitutional basis was defeated, there being 90 in favor of it to 102 against it. The defeat of the district system was due to several causes,—the large states refused to adopt a system that would dissipate their electoral strength, unless the small states would consent to abolish election in the House of Representatives. Resolutions had been sent from many state legislatures, advocating the adoption of the amendment, and a New York Congressman asserted, in the course of debate in the House, that the great majority of the people of his state, if their opinion was to be determined by debates, newspapers, speeches, and private conversation, demanded a uniform district

system. The effort for a constitutional amendment requiring the electoral vote of states to be taken in districts was at this time made in the Senate, under the powerful leadership of Thomas H. Benton, of Missouri, but it was doomed to failure. Nevertheless, so convinced was the distinguished Missourian of the defects of the general ticket system and the evils of a possible House election, that he continued his attempts for a constitutional amendment for twenty years.

Opposition after Benton's time was only sporadic until 1875, in which year Senator Oliver P. Morton, of Indiana, commenced his agitation for a constitutional amendment which should include the abolition of the general ticket system. The Hayes-Tilden electoral crisis followed shortly after the initiation of the debate upon Morton's proposed constitutional amendment, and naturally prevented a proper consideration of the subject. Morton, however, remained a persistent foe of the general ticket system until his death, in 1878. One of his reasons for opposing it was that, under it, no man could vote unless he had a party in the state large enough to hold a convention and put an electoral ticket in the field. He opposed also the alternative election in the House of Representatives. It gave too great power to the small states. Under the apportionment in force in 1875, forty-five members of the House out of a total of 292 could elect a chief executive. Nevada, with its 42,000 population, had a vote equal with New York, having 104 times as great a population. Nineteen states with scarcely more than one fifth of the population of the United States might elect a President in the House of Representatives against the wishes of the other four fifths.

Evils of General Ticket System.

One evil of the general ticket system may be emphasized this coming fall. With three leading parties in the field, no party may get more than a minority of the popular vote in close states. But if it get a minority vote that is larger than that obtained by any other party, that minority vote will assure it *all* the electoral vote of the state. In New York, for example, less than one half of the voters of the state may decide the fate of all its forty-five electoral votes. The injustice to the voters of the state is manifest if a minority may control the state's entire electoral strength. When such a result is achieved by bribery and corruption, not only the people of the state, but the people of the nation, suffer an insupportable wrong.

The evils of the general ticket system are many and portentous. There can be no useful minority party or no third party in a state which normally gives its vote for one particular party under the general ticket system. Before the Civil War there was no Whig or Republican party in the southern states, for no such party had any possible chance of success under the general ticket system—hence arose the solid south; hence the loss of the corrective influence of opposing opinions; hence, perhaps, also the success of the reckless pro-slavery spirit that drove the southern states to secession. Under the general ticket system a gold party could hardly muster a corporal's guard in a silver state. The system destroys all hope for the development of an opposing party organization in states in which one of the leading parties is constantly predominant. Yet there can be no doubt of the advantage to the country at large of giving a minority party expression in every state, instead of crushing minorities out altogether, as does the prevalent system. It tends even to nullify the vote of the small states, and makes the populous states determining factors in elections. It readily permits of the successful perpetration of fraud, and offers most seductive inducements to its commission. The closer the state the keener the struggle for party supremacy, and the greater the temptation to the purchase of the few votes necessary to carry a state from one party column into another. It would be easy to show from our history that in many a presidential election someone or more of the close states has been a pivotal state. In fact the very term "pivotal state" implies the existence of a state or states upon which the election has turned. It is so easy to buy enough votes in a close state to carry an election that the temptation to purchase them is too great for parties to re-

sist. The electoral vote of a state like New York, which has often been a pivotal state in a presidential election, might by the purchase of a few votes, be stolen from the Republican or the Democratic party; hence the great danger in the general ticket system and the desirability of abolishing it. The easier it is to purchase enough votes to change an election, the greater the wrong to the whole American electorate. To abolish the general ticket plan is to destroy the system by which fraud has been nurtured and developed.

The persistence of the general ticket system, at least in earlier days, was due not to the lack of recognition of its evils, but to the reluctance of the small states to consent to the abolition of an election by the House of Representatives. In that election each state has one vote. The states are upon a parity which is pleasing to a small state, giving it a sense of importance. One disadvantage of an election in the House is that it enables states which represent only a minority of the population to elect the chief executive.

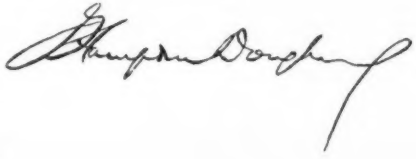
Should the Present Method Be Retained.

When we realize the injustice and the perils of the electoral system—the danger that lies in disputed returns, in the choice of ineligible electors, the possibility of a meeting of an electoral college on the wrong day, the likelihood of error because of the death of an elector or of a vacancy in his office, the grave danger, in the case of disputed returns, that the vote of one or another state may unjustly be rejected, the opportunities for fraud engendered by the general ticket system, and the perils that lie in an election in the House of Representatives; when we realize that one presidential contest brought the country almost to the brink of civil war,—we may well ask why should the present method be retained, and particularly why the general ticket system should survive. The whole electoral method is, I believe, doomed to fall as soon as the country appreciates the extent of its evil possibilities.

Actual presidential electors would be unnecessary even in an electoral system giving each state an influence in a presidential election proportionate to its population. The electoral college could be abolished entirely and yet the relative power and importance of each state be retained. It would be necessary only to allot to each state such an electoral vote as it has at present. Instead, however, of permitting the total electoral vote of the state to be given to the candidate having a larger vote than his competitors, it would be more just to apportion the state's electoral vote among the several candidates, in the ratio which the popular vote for them bore to the total vote throughout the state.

Under the plurality rule no man can be elected President who has not received more votes than any other candidate; whereas under the general ticket system a man might be chosen who had received the smallest number of votes, provided he had the largest number, and a majority, of the electoral votes, or provided he were elected in the House by a majority of the states, even the smallest. From every point of view the proportionate or plurality principle is the fairest.

A satisfactory corrupt practices law might mitigate the evil, but would not extirpate it. The ax should be laid at the root, the whole electoral system swept away, and with it the general ticket system. The good features of the electoral theory might readily be preserved although its perilous machinery were discarded. This could easily be effected by an amendment abolishing the electoral colleges, and providing that each state should have that number of fictitious electoral votes to which its representation in the Senate and in the House entitles it under the Constitution. Then each person voted for would be entitled to have counted in his favor a number of the fictitious electoral votes of each state, corresponding to the popular vote cast for him therein.



Political Recognition of Women the Next Step in the Development of Democracy

BY MRS. CRYSTAL EASTMAN BENEDICT

HEN I chose this title, "Political Recognition of Women the Next Step in the Development of Democracy," it was several months ago; before the splendid constitutional convention in Ohio recommended a woman suffrage amendment to the voters of that state; before the new Republic of China granted to its women the right to vote on the same terms as men. If I were framing the title to-day, I think I should say, "Political Recognition of Women an Immediate Phase in the Development of Democracy."

In Norway, Iceland, China, Australia, New Zealand, Wyoming, Idaho, Utah, Colorado, Washington, and California, women have full political rights to-day; that is, they vote on the same terms as men. In Sweden, Denmark, Great Britain, and twenty-five states of America, women have some voting privilege, either school suffrage, municipal suffrage, or tax-paying suffrage. Further than that, a woman suffrage amendment was submitted to the voters of Ohio on September 3d. In Kansas, Oregon, Wisconsin, and Michigan, woman suffrage amendments have passed the legislature, and will go before the voters for ratification on November 5th.

There are over a million women voters in the United States to-day. On November 6th, 1912, there will surely be two millions. "Votes for Women" then, in democratic countries the world over, is no longer a joke, no longer a mere possibility,—it is a rapidly approaching reality, and for that reason, if for no other, I think is of interest to the legal profession.

Economic Basis of Equal Suffrage.

Now, why has this question become an immediate political issue? Why are there a thousand women asking the right to vote to-day where there was one fifty years ago? As usual, economics is at the bottom of it. Political changes almost always follow economic changes, and the economic position of women has undergone a tremendous change in the last century. Men used to say: "Woman's place is in the home. Politics is none of her business." Or, if they were more polite, perhaps they put it this way: "Government is not concerned with the interests of women. Why should women burden themselves with the concerns of government?" One hundred and fifty years ago perhaps that was a reasonable remark,—a fair argument against granting women the right to vote; but I need not tell you to-day that it is ridiculous. Under modern conditions the concerns of women are not only in politics,—all mixed up with politics,—but they are the very material of politics. I don't suppose there is one law in ten considered by a state legislature which does not directly concern the interests of women in some way. Therefore it is that women cannot "mind their own business" in the modern world, they cannot look after their own interests, without the right to vote, any more than men can.

Consider first the position of the housekeeper, the mother, the home-maker, and her relation to the ballot. You say to her: "My dear woman, you need all your time and strength and thought and energy for the proper care of your family." True. Why not? But that is the best of arguments for giving women the right to vote. For the proper care of her family, if for no other reason on earth, the modern woman needs the vote. What does the health and happiness of

her children and her family depend upon in these days? For the most part she lives in a city. The welfare of her family depends, among other things, upon getting pure air to breathe; depends upon keeping down congestion in crowded parts of the city; depends upon a pure water supply; depends upon the chance of getting untainted milk, and sound meat; and it depends upon schools,—good schools,—plenty of playgrounds, cheap transportation, and a lowered cost of living. Of all these things, not one is to-day within the control of the individual mother, standing alone. They are all of them matters of public control, and the only way the mothers and housekeepers, the people chiefly and directly interested in these questions, can control them, is by the use of the ballot.

Representation of Home Interests.

This cry of "Votes for Women" looks pretty sensible when you look at it calmly, doesn't it? But now you say: "What about the father? Isn't the father just as much interested in the welfare of the children and the family as the mother is? Doesn't he vote? Isn't that enough? Can't he represent the mother?" Now, let's face that question fairly, and see if the father can represent the mother and her business interests as well as she can represent herself and her own business. Suppose there were two brothers very fond of each other; one was a plumber,—a union plumber,—and the other was a small farmer; you would not say that the plumber could represent the farmer at the polls, and you would not say that the farmer could represent the plumber at the polls. "No," you say, "each must represent his own business interests." Now the business of the mother—the housekeeper—is the welfare of her children; the health and happiness of them is her daily and hourly concern. In no such sense is it the concern of the father. His business may be anything from presiding over a court to sweeping the streets, but very seldom is his business cooking food, housekeeping, taking care of children. And, if the plumber cannot represent his brother the farmer in politics, very little better can the father represent the mother's business interests in politics. There is a group of special interests which mothers have always at heart, always in mind, the most important of all special interests in this country, because they concern the *home*, and these interests have no direct representation in the electorate to-day. That is perhaps the biggest mistake we are making in this so-called democracy of ours.

Wage-Earning Women.

Now, take up the lot of the wage-earning women,—the millions of women who, in spite of the oft-reiterated declaration that woman's place is in the home, are not in the home, but are out earning their living in competitive industry, side by side with men. Five millions in 1909; eight millions in 1910; an ever-increasing number. I say, to deny those women the protection of the ballot in their struggle for a livelihood, to give them no voice in making the laws which govern their labor, to deprive them of the power and dignity before the law which comes with political power,—and we know it does come with political power,—is no purely theoretical injustice, it is an actual handicap to them in their struggle,—a rank economic injustice.

Now, it is idle to say that all those eight million women are out earning their living in the industrial world simply because they don't like taking care of babies. They have been forced into the industrial world by economic necessity, by the need of bread and butter, and nothing else. Owing to the invention of machinery and the division of labor, the great productive industries like spinning and weaving and butter-making and cheese-making, and a hundred others which used to be conducted by the women in their own homes, and through which they contributed their full share of the family income, have long since left the home and gone into the shops and factories. The women have followed their jobs; that's all. The presence of women in competitive industry is an undeniable fact. Many economists think it is the biggest and most startling fact of modern industrial history. The vast majority of women must work for a living,

and if their work has left the protection of the four walls of the home and gone into the competitive industrial world, they must follow it.

Chivalry.

We hear a great deal about chivalry in these days. It is a beautiful sentiment, to be honored and treasured and preserved. When it reaches its height, as in the Titanic disaster, where men voluntarily gave up their lives for the sake of saving women who were strangers to them, it even becomes sublime. But what does this beautiful sentiment of chivalry count for in the everyday struggle of industrial competition? Two years ago there was a great strike in New York,—a strike of the shirt-waist makers,—the greatest strike of women wage-earners in the world. These women were striking against low wages and all sorts of arbitrary and unfair conditions in their trade. In the course of that strike they were subjected to such brutal intimidation, threats, abuse, and violence by the police and hired thugs of the employers that all enlightened New York rose up and protested. When they were arrested and brought before the city magistrates, they were so unjustly treated, so many times fined and sent to the workhouse for no violation of law, —for peaceful picketing,—that many well-known New York lawyers offered their services free, to defend the cases of these striking shirt-waist makers. Finally the strikers decided to appeal to the mayor, and one day New York saw 30,000 women marching through the streets to the mayor's office, to protest against abuse and injustice, and to demand the protection due to American citizens. What did the mayor do when the committee brought in the petition of 30,000 working women? He didn't even listen. He said he was not interested in 30,000 working women. Now, where was the mayor's chivalry? What did it count for? Wouldn't 30,000 *votes* in the hands of those women have counted for more?

There was a bill before the New York legislature to shorten the hours of labor for working women; to limit them to 54 a week or 9 a day. They held a legislative hearing on this bill. Twelve large employers appeared, and five working women, representatives of working women's trades unions. Consider for a moment the relative positions of these two delegations: The twelve employers came to demand what they wanted from their own representatives. The five working women came to beg what they wanted from somebody else's representatives. I think that is an honest way of stating it. Whether you would be in sympathy with the employers in that instance, or with the working women, is not the point. If you are a true American, if you believe in democracy, you cannot sit quietly by and let such inequality continue.

And how about chivalry on that day? Did those twelve employers, when they saw the working women there, say: "Oh, well, if you ladies want this bill to pass, it's all right; we will retire and withdraw our protest?" No; they didn't; they stayed and fought to the finish and killed the bill. Business is business. Chivalry won't help you in it. As Wendell Phillips said, "Everybody must have the power of protection in his own hands." That is what democracy means.

Need of Political Representation.

It seems to me the one honest conclusion of every thoughtful man who inquires into the meaning of this widespread, growing demand on the part of women for political recognition must be something like this: "The vote is a symbol of power. It is the means through which I make my will count in the decision of public questions that affect my interests. Now, in the early days when each individual housekeeper could control the character of her milk supply by seeing that her own cows were kept clean; when she drew the water from her own well; when pure food laws were unknown and unnecessary; when garbage was fed to her own pigs; when neighbors were too far away to make ventilation and sanitation pressing public questions; when the whole farm was the children's playground, and their early education largely within the mother's own control,—women were not in-

terested in politics, and they didn't particularly need political representation. But to-day all these conditions on which the success of a woman's work depends have been taken out of the woman's control. The only way she can gain control of them to-day, when they are public questions, is to take part in the administration of public affairs, to have direct representation in the democracy by means of the vote. Her will must be made effective in the legislative councils and in the election of officials to enforce our laws. In short, she needs the vote just as much as I do, and for the same reasons."

Again, the thoughtful man must reason with himself: "In the early days the only women employed in industry were women employed in their own homes at spinning, weaving, and such industries, where they could largely control the conditions of their labor. To-day, these industries have left the home, and the millions of women who have had to follow them can no longer control the conditions of their labor; and they need political representation in order to have anything to say about those conditions, just as much as their brother wage-earners need political recognition."

And finally he must conclude, "Whether I like it or not, the women are going to get this political recognition, and they are going to get it very soon."

One question remains for him: "Shall I make it easy or hard? Shall I hinder or help this inevitable step towards the fulfilment of democracy?"

Objections of Obstructionists.

Are there any considerations that make it worth while to delay this movement?

First, consider the foolish things that are always said against every step in the emancipation of women, such as: "When women vote they will lose their feminine charm, and men will not marry them; they will refuse to bear children; they will neglect the home; leave the baby; and let the bread burn." These notions about woman suffrage need not frighten us. The same things were said about the higher education of women fifty years ago. Both have been tried, and none of these terrible things have come to pass.

Seriously, does anyone suppose that love-making has gone out of fashion in California, or marriage fallen off in Wyoming, or the birth-rate decreased in Colorado as a result of woman suffrage? The most ignorant of us know that the instincts of self-preservation and race propagation are the deepest instincts of all animal kind; no mere institutions of man are going to disturb those great fundamentals.

Now, some pessimist says: "Women will not vote if you give them the right. What is the use of doing it?" He does not know that wherever women have been given the full franchise they have voted in almost exactly the same proportions as men,—if anything in a little higher proportion. Then he falls back on the fear that woman suffrage will increase the ignorant and criminal vote. But census statistics show that more girls graduate from high schools than boys, by several thousand; that there are more illiterate men in the country than there are women; and, further, that of the immigrants who make up the bulk of our ignorant and purchasable vote, only one third are women. As for the criminal vote, from 4 per cent to 6 per cent of our prison inmates are women.

At last, being very wise and philosophical, our imaginary obstructionist says: "All right, I grant everything you say, but all the women don't want to vote. Let's wait until all the women want it." But I would say, be a little wiser, a little bit more philosophical; remember that every extension of the franchise has been won not by a unanimous request on the part of the people to whom it was to be extended and who were to benefit by it, but by the incessant efforts of a few tireless leaders. No reforms are brought about by everybody's getting up at once and asking for them. The women are going to want the vote after they know what it means, and that is why it is easier to convince men of the importance of women's suffrage to-day than it is to convince women.

Another class of men object on frankly self-interested grounds, because they

are afraid women would not vote as they want them to. For instance, Socialists have said to me, "I would vote for woman suffrage if it came up, but I am afraid it will delay socialism." Prosperous business men have said, "Oh, I suppose it is just; I suppose it is all right, but I am afraid it will hasten the days of socialism and prohibition." The old-time politicians fear the women's vote, because they are afraid it will upset party lines. But what of it? What if it does extend county option a little bit? What if it doesn't exactly suit your interests? Where is the spirit of democracy in this country when one citizen can say to another, "You shall not vote, because your vote would be contrary to my interests?"

And finally, a practical man steps up and asks, "What good is it?" In the states where women have voted, what have they accomplished with it? Now, I can't tell you that women have altogether purified politics in Colorado, that there is not any graft in Utah and Wyoming, and that all the officials of Idaho are absolutely honest, as a result of woman suffrage. No such result has come to pass, nor can it be expected. But I can say this: It is the opinion of practically every respected public man in the states where women vote, that the influence of women in the electorate has been to make legislatures and city councils and officials pay more attention to the interests of women and children and the home. That has actually been the result of woman suffrage in every country and evey state where it has been tried, and that is why you will find the men of those states and countries who care about progress, about humanitarian legislation, about conserving the life of the people, on the side of woman suffrage.

Thus, all the so-called arguments against granting women the franchise disappear in the light of reason. But it is not reason that rules the world, it is feeling,—sentiment,—and always at the bottom of every fair-minded man's objection to woman suffrage you will find a strong feeling,—a sentiment that reacts against the idea of women having anything to do with politics. I suppose sentiment is the precious thing in life. We would not lose it out of the world even if we could, but sentiments *change from age to age*. It was sentiment that kept the feet of the women of China cruelly bound for centuries. It was sentiment that opposed the higher education of women. By all means, then, let us be controlled by sentiment,—but by sentiments appropriate to the age we are living in, not by those of a by-gone time.

Crystal Eastman Benedict.

To calm the quaking fears of those timid male souls who conjure up a reign of radicalism under woman suffrage, let me remind them that woman is the most potent conservative force in human society and that the experience of those communities where women have longest exercised the voting privilege is that women voters are wisely discriminating, seeking betterment of conditions along lines of proven excellence rather than through doubtful experiment; they are progressive, not revolutionary.

—*Hon. Frank W. Mondell.*

The Short Ballot and an Efficient Judiciary

BY H. S. GILBERTSON

Assistant Secretary, The National Short Ballot Organization

OF COURSE, in dealing with any one of the many and much-mooted technical problems of the judiciary, the ordinary layman, like the present writer, is just a plain "piker." But this is not to say that there are no phases of the matter in which the average citizen has the very highest interest and the only interest which in the long run is worth considering,—the interest in having justice square with those notions of common sense and intellectual honesty which are the common property of every healthy-minded person. It is exactly the same interest which the layman has in the science of engineering and medicine: the desire to see the erection of private and public works on sound principles and the preservation of the human body against the ravages of disease. The average citizen judges the judiciary by exactly the same criterion which he applies to any other profession,—by its fruits; and if the fruits are evil, it is the right of the citizens to take such steps as they see fit, even to laying the axe at the root of the tree. And bear this in mind, that in the nature of things, the action which the people will take will nearly always be of a drastic character, because that is the only kind they know anything about. The intermediate measures must come from the legal profession.

For example, there is a section in the Federal judiciary law which makes it impossible for a state law declared unconstitutional in its own jurisdiction, to go up to the Supreme Court of the United States. But could you expect a layman to stumble on to the significance of that? No, the popular American voter in the past has had a universal cure for the evils which have beset him because of the various shortcomings of public officers.

A Popular Fallacy.

Just as these lines are written, the writer's eye falls on a newspaper clipping from Oklahoma which tells the story afresh. Something is the matter with the postmasters down in that part of the country; perhaps they have beeu dipping too freely in politics. At any rate, the Democratic committee has come forward with the inevitable suggestion: The postmasters should be made elective officers! It is the old superstition that in order to control an official you must elect him; a superstition which does not seem to have set any limit to the number of officers which a voter can examine, nor the character or relative importance of the duties which the officer performs. The rule is always the same. These simple-hearted democrats must have their fling at electing everybody.

Selection of Judges.

In practice we know that the mere fact of popular election never yet made a judge attentive to the larger interests of his constituents. What has actually happened in a great many cases, if not in most cases, is that the judge was not actually selected by the people at all. Everyone knows that under the old convention system the question rarely (and happily so) entered into the pre-primary

discussion, as to who the judicial candidate would be, assuming, naturally, that there was such a thing as pre-primary discussion of anybody, outside the ranks of the ticket-makers. And so, it is perfectly clear, if you had two political parties, and neither of them engaged in any serious popular debate of the candidates, that the choice at the general election was one of Hobson's own. To put the case in an honest light, you should say that the voter had an option between a judicial appointment made by the Democratic committee and one made by the Republican committee.

Direct Primary System.

But suppose, now, that you are living under the direct primary system. Surely this is an opportunity for the people to select their own judges. And so it would be, under certain conditions. If the people were supremely interested, for example, in the county judgeship for its own sake, and if there came forward some well-known jurist to fill the vacancy, and if the issue of electing a judge to fill a vacancy were isolated from the petty candidacies of coroners, school directors, sheriffs, county clerks, ward alderman, and forty others,—if you could have all these three conditions, there would be something to be said in favor of popular election as a method of selecting judges. But you don't.

The Long Ballot Difficulty.

I deny that the people, however much they are interested in the judiciary, are concerned, under ordinary conditions, about the individual judge. There is nothing in the nature of a case arising between two private parties to a suit which calls for an opinion from the man on the street. Nor is an issue which might be involved in a judicial election usually isolated from a half dozen proper political questions which are always presented. When, for instance, the city of Chicago sandwiches in the judicial candidates on a ballot containing over fifty sets of candidates for various offices in the state, county, sanitary district, and a few other civil divisions, the reason is not far to seek, if, in practice, the Cook county judges are sometimes curious reflections of the public's choice. But, instead of attempting to prove these assertions, let me cite a simple but suggestive incident which can doubtless be duplicated by many who read these lines. In Pittsburgh a new county court was established some two years ago, and five well-known lawyers were appointed to sit on the bench until the general election. At the primaries these men were candidates for nomination at the Republican primaries. The ballot called for the filling of forty offices from a list of one hundred and nine names. Pathetically these judicial candidates appealed to their friends of the Pittsburgh bar. Said they in a circular: "Our canvass thus far discloses the fact that the tendency is to continue us in office. But the difficulty is that the voter does not know that we are the incumbents." Just what was the degree of the voters' ignorance of their qualifications may be left to the imagination!

Separate Ballot.

Some of the states, including California, have adopted a separate ballot, by which the judicial ticket may be chosen, not only without partisan designation, but by majority vote. This is doubtless a distinct gain, but it will certainly not, in itself, enhance the importance of the judiciary in the eyes of the voter. And while it may take the judge out of partisan politics, it may make an unseemly competition for office more strenuous than ever. The judge will not have the momentum of party organization to help him win his campaign.

Popular Election.

From the standpoint of the judiciary at large, the system of popular election has not made judges distinctly conscious of the interest and the rights of the plain citizen. It has not given judges vision to see beyond the precise question involved in interests of the particular litigants before him. Can anyone accuse the courts of California of a peculiar regard for the public welfare? Have the

opinions of the California judges more nearly squared with justice than those of the judges of New Jersey, who are appointed? Which is nearer the people, the New York court of appeals, which is elected for a term of years, or the Supreme Court of the United States, which is appointed for life? The celebrated Ives case, which Mr. Roosevelt has frequently quoted to illustrate the miscarriage of justice, originated in New York state. The judges threw out the employers' liability law under which it arose. Not many weeks later a precisely similar principle of law upon which the New York case was based, was unanimously upheld by the United States Supreme Court, which is several degrees away from the people, and subject to removal only for high crimes and misdemeanors.

Decision of Matters of Fact.

The truth is, that not only does popular election not always elect, but even when it does elect it does not always control. In one of the most illuminating volumes on the judiciary problem which has yet appeared, Mr. William L. Ransom,[1] of the New York bar, has exposed the fallacy implied in this statement. In effect, he shows that the case of the judiciary is *in rem*, so to speak, and not *in personam*. Or, as Mr. Roosevelt puts it, "don't recall the judges; recall the decision." What makes the really acute judicial problem at the present time is the fact that the courts have been called upon to adjudicate questions which were not of a legal character at all, but matters of fact, which only the whole people are competent to decide. This refers, of course, to the judicial definition of the "police power," which arises out of so much of the advanced social legislation which is being projected in our time. Indeed, if it is not unkind to say so, it would be difficult to find a set of men who are more hopelessly unfit to decide these questions. The whole point of view of jurisprudence, which is forever looking backward for precedent, is opposed to the point of view of the new democracy, of which the chief trait is to look forward and beyond the present into a society which is always pressing on an ideal. Judges, as judges, don't know life in factories or mines or bakeshops. Nor are they necessarily competent to interpret the change in the public conscience, which in the eighteenth century would look complacently on while an apprentice smashed a finger in a broken Franklin press, and in the twentieth century would seek to fix the blame for a similar accident on a thoughtless employer, where, in justice, it belonged. And so, when a judge, saturated with the wisdom of Coke, and Kent, and Marshall, undertakes to translate himself into the world of Samuel Gompers and of Jane Addams, the result is often pathetic to all parties concerned.

But the remedy is obvious: Let the judges confine themselves to issues of law, which they are competent to decide, and let the jury of the whole people pass upon the issues of fact in these great and essentially public cases which concern the welfare of the whole people, in some such manner as Mr. Roosevelt has suggested.

However, this article does not aspire to rate as a campaign document. The point is simply that, when the judiciary problem is reduced to its elements by competent constructive legal minds, it loses much of its complexity. The courts have slopped over into politics,—not into partisan politics, so much as into the field of public opinion. The line between law and public opinion has become blurred. Mr. Roosevelt has made a practical suggestion for clothing the judiciary with genuine independence.

And when we have stripped the courts of their political functions, what will remain of the judiciary problem, as the plain man sees it?

Efficiency.

It will not be solved by any means. There will remain the problem of an efficient judiciary within the strictly legal field. In a recent interview in London, Mr. Samuel Untermyer is quoted as saying, "They know here how to administer justice swiftly and accurately. It is a science. With us it is largely a lottery." There is possibly considerable

[1] Majority Rule and the Judiciary, Scribner's 1912.

fairness in attributing this higher efficiency of the English courts, in part, to the manner of their selection. The administration of justice ought to be a science with us. And you cannot secure scientists by popular election! That is the way to secure representative, political officials, but we would not select a baseball team in that manner, or a civil engineer, or a chemist. Why a judge? The English judges are appointed by the Crown. They keep their fingers out of politics, in every sense of that word, because they do not have to seek re-election and cannot set aside laws as unconstitutional. Of course, merely to make our judges appointive would not automatically make an efficient system. But if we were to drop the system of popular election, we would certainly remove one of the obstinate barriers to an ideal judicial system. Incidentally we shall be lifting some of the burden off our heavily laden ballots. Or, to change the figure, if we could get the judges out of our light we could watch our other elective officials to better advantage.

The appointment of judges, then, would do much to carry forward the short ballot program, which is now receiving the earnest support of all constructive political thinkers, including the three leading presidential candidates. Mr. Roosevelt, radical, apparently, as some of his latest proposals seem, is in favor of an appointive judiciary. And Woodrow Wilson, of the line of Andrew Jackson, is fond of pointing out the superior qualities of the appointive judiciary in New Jersey. Mr. Taft in his speech of acceptance indorsed the short ballot principle, though not specifically mentioning judges.

Gubernatorial Nominations.

It will be heavy sledding, this effort to get the people around to a sensible judicial ballot, but it will be worth the trouble. As a transition to an appointive system the following has been suggested by Mr. R. S. Childs, of New York: Impose upon the governor the duty of nominating judicial candidates for all vacancies three weeks before nominations are closed; all other nominations to be made by petition, and the judicial nominations all to be placed upon a separate portion of the ballot without partisan designation, except that opposite the governor's nomination shall appear the words, "Recommended by the governor."

The effect of this procedure would probably be to give the governor's nominee a prestige which at least the governor's own party would not undertake to counteract. At the same time, the people would have, as they do now, the power of veto, which they could exercise or not as they saw fit.

Simplification! simplification! simplification! is the task that awaits us—to reduce the number of persons voted for to the absolute workable minimum, knowing whom you have selected, knowing whom you have trusted, and having so few persons to watch that you can watch them. That is the way we are going to get popular control back in this country, and that is the only way we are going to get political control back.

—Hon. Woodrow Wilson.

Election of Senators by Direct Vote

BY HON. WILLIAM E. BORAH

United States Senator from Idabo

[Ed. Note.—A constitutional amendment providing for the direct election of United States Senators has been requested by ten states, some of which have instructed their senators and representatives in Congress to promote the submission of such an amendment to the states. Senator Borah has taken a leading part in the advocacy of this reform and introduced the so-called Borah joint resolution providing for the election of senators by the people of the states. Such a joint resolution was twice passed by the House and twice amended by the Senate in such a way as to prevent its adoption by the necessary two-thirds vote in both houses of Congress.

We present herewith, by Senator Borah's permission, his argument in favor of this salutary measure.]

AS early as 1826 a resolution was submitted to Congress, looking to this change in the manner of electing Senators. It has been before Congress session after session for eighty-five years. It has met the approval of the first branch of Congress many times. It has received serious discussion here upon different occasions by some of the ablest men who have occupied seats in this chamber. At least thirty-two states have declared in favor of the amendment or the principle. It has been the subject for years of discussion by editors and publicists. Literature on the subject is very extensive. And now after nearly a century of discussion and consideration the sober, second thought of the people upon which the fathers so implicitly relied is greatly in its favor. If government of the people, by the people, and for the people, has any bearing, this record ought to be made now and the judgment of the people here entered in accordance with this earnest and long-standing demand.

Our Constitution says: "The Senate of the United States shall be composed of two Senators from each state."

Thereafter, in that portion of the instrument providing methods of amendment, it is said: "No state without its consent shall be deprived of its equal representation in the Senate."

Proportional Representation.

We are now told with unusual earnestness and perturbation that if the mode of selecting Senators is to be changed, we must be prepared to meet the demand for a change in those provisions of the Constitution; that there will be a demand for representation upon this floor in proportion to population. Thus they would excite our fears and take advantage of our credulity. We are to be persuaded from the advocacy of a measure, which we believe to be righteous, out of the danger that for reasons wholly disconnected in logic or principle with the present proposition some other amendment may in time be proposed and adopted. It is in such potent arguments that opposition to this question is represented.

The question of whether representation in the Senate should be in proportion to population or equal as to all the states was in no way affected or controlled by the question as to the mode of electing Senators. Equal representation in the Senate and proportional representation in the House was one of the great compromises of the Constitution between the large and the small states. This compromise was neither augmented nor retarded, embarrassed or accelerated, by the question of the mode of electing Senators.

A study of the debates in the convention and the political literature of the day will not reveal that the mode of electing Senators ever entered into the

peculiar elements of that compromise. Had the fathers seen fit to adopt the plan of electing Senators by the people, or the plan of electing them by electors, as proposed by Hamilton, the compromise as to equal representation in the Senate and proportional representation for the House would have been made, and made precisely as it was made. We are not disturbing in reason or in logic any compromise of the Constitution. We are not throwing down the bars for proportional representation. No member of the Constitutional Convention so much as suggested that the manner of electing Senators had anything to do with the extent of representation. Neither did anyone propose that, if Senators were elected by the people, thereupon there should be proportional representation. That piece of irony belongs to the political literature of a later age; to more subtle and resourceful logicians. It will hardly follow that the small states will feel any uncontrollable impulse to give up their equal representation, simply because they have been blessed with a cleaner and more efficient mode of electing their Senators. And this right of equal representation cannot be taken away by a three-fourths vote of the states. It can only be taken from a state by its individual consent. But this is the argument which has been made to do service against this reasonable and righteous change. I repeat, the manner of electing Senators never did have and never could have any effect upon the question of representation.

Change in Nature of Government.

Akin to this argument, and to the same effect, is the argument that by changing the mode or manner of electing Senators we will change the nature of the organization of our government, and of the relation of the states to the Federal government, and of the relation of the Senators to the states. This broad and startling proposition seems worthy of consideration. What possible structure of our government will be affected by the fact that a Senator appears in the Senate as a result of the direct vote of the people, rather than by the vote of an agent selected by the people to cast that vote? Is it reasonable to assert that by changing the mode of selecting a state officer you change his attitude toward the state, assuming that a correct attitude is one of faithful representation? There are at least a dozen Senators who, as a practical fact, were elected by the direct vote of the people. The people selected them and elected them. The legislature but recorded the decree already rendered. Do they stand in any different relation to their states? Are they less regardful of its interests or hampered more in representing it than those who were elected by the legislatures? If the rights of these states are invaded, are their Senators less sensitive to that fact? Does the current of political power flow any better by flowing in a roundabout way through a legislature, than when it flows directly from the source of power to one who is to exercise that power?

It is true that the fathers had the conception of an ambassadorial meeting in Washington, which it is hard for us at this time to grasp. It was natural in that day, for the Members of the Confederate Congress were in a very true sense the ambassadors of the different colonies or states. Each state determined for itself his whole power. They were not appointed or elected under any general Constitution for the whole country. The state could rescind the appointment at any time and call him home. And he went to Congress in the true sense of an ambassador from his state. But now we have the Constitution, which makes us in Federal matters one people. To say in this day and age that a Senator represents the invisible, intangible, corporate being, the state, aside from all the elements which make up a state, is but to invoke an overworked fancy. The Senator does indeed represent the state. But his state includes all that makes up a state; not alone the legislative department, but all the departments of the state government; not alone the corporate and intangible sovereignty, but all that and more—the bone and sinew, the flesh and blood, the territory, the relation of the people to the territory, the hopes, as-

pirations, and ambitions of the citizens, the social, economic, and industrial life —this is the state in its entirety as a true and faithful Senator represents it. This is the state which the Senators should represent. If he does not represent the state in this respect, it would be because under the vicious system now prevailing some sinister power has intervened and secured a representative for a distinct and special interest within the state. But if the people elect the Senator, will he not then be in the fullest and best sense a representative of everything that makes up a state?

The Supreme Court of the United States has said: "A state in the ordinary sense of the Constitution is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanction, and limited by a written constitution, and established by the consent of the governed."

There is a fundamental distinction to be made between a state and the government of the state, the corporate entity. By the term "government" we mean the organization of the state, the machinery through which its purposes are formulated and executed. But by the term "state" under our Constitution we mean all these things, including the government, the territory, the people, its laws, usages, customs, its moral and industrial interests. In no other sense can a Senator represent a state. The Hebrew people might have been called a nation while they were under the guidance and direction of Moses. They became a state when Joshua settled them in Palestine.

The constitutional recognition of sovereignty remaining in the state is recognized in the principle of equal representation, and not in the manner of selecting that representation. The national and Federal principle is still preserved, combined, and unimpaired, by the equal representation in the Senate and the proportional representation in the House. In like manner the check of one body upon the other is preserved. The object of having two branches of Congress or of any legislative body is to have the representation made by the different constituencies, different interests. Thus we still have, in the language of Mr. Story: "The Senate represents the voice not of a district, but of a state; not of one state, but all; not of the chosen pursuits of a predominant population in one state, but all the pursuits of all the states."

Would the distinguished Senators from the great state of Texas in any different degree represent the broad and diversified interests of that entire state, —the trading and shipping interests upon one side and the vast stock-raising interests upon the other? Would not the Senators from the state of Massachusetts still represent not only the manufacturing interests, but the agricultural interests? It would still be true, also, that no law could be passed without a majority of the people and then a majority of the states. The supposed quickness of action under impulse and passion that was sought to be avoided is still avoided. The long service of six years still begets the profound sense of responsibility, and guards against unwarranted yielding to passing political gales, which it is so often urged the fathers had in view. None of these fundamental principles are changed by changing the mode of electing. Rather does the change guard against the possibility, and in these times the probability, of securing those who do not represent the state, but interests or particular forces.

It does not destroy the check intended to guard against influence exerted through the passion or prejudice of an hour, while it does tend to guard against sudden changes superinduced by causes more sinister and destructive to democracy, more disintegrating and demoralizing than political upheavals or turmoils. Influences far more to be feared than the hasty and inconsiderate action which the fathers feared are to be dealt with by our present civilization. If our fathers were wise to guard against the one, will not their children display something of the same wisdom if in preserving the one they guard against the other?

Legislative Election.

One of the most conclusive arguments in favor of taking the election of Sena-

tors away from the state legislatures is that these lawmaking bodies may be relieved of an exceptional and unnatural and incongruous duty. Not only is it aside from any duty or function naturally attaching to legislative bodies, but it works to the great and almost constant embarrassment of such a body in its important and natural work. It has demoralized state legislatures more than any one single matter with which they have had to deal. The members of the legislature should be elected upon the sole question of their fitness for the duties of state legislation. After they are elected they should be permitted to perform that important work with an eye single to the moral and industrial interests of the state, disentangled of the purely political task of performing the duties of an elector. Our states are coming to be almost as important in the field of legislation, if they do what they should do, as was Congress in the beginning of the government. When measured by their varied interests and population, their moral and industrial growth, individual states are now equal to the thirteen states when Congress first assembled. Unfortunately, and to the disturbance of everyone who reflects deeply upon the question, many of the duties of the states are being shifted and subtly attached to the national government. If there is a gospel of political salvation which ought to be preached in these days with the fire and zeal of Peter the Hermit, it is that of arousing the states to action in these matters of vast and purely local concern. They ought to claim the right to do that which under the Constitution it was expected they would do.

And then, having the right allowed them, they ought to perform their duty with energy and pride, with intelligence and courage, and with the support of every man who loves our form of government. Just in proportion as you withdraw from the people the responsibility of caring for and the zeal in guarding matters of local concern, just in proportion as you take from them the right and relieve them of the duty of looking after those matters peculiarly belonging to local communities, just in that proportion you unfit the citizen for the duties of citizenship, shut the door of the great school of experience in his face, and deprive him of his training. When you do so you are undermining the pillars of the Federal Union. The man who would see the states stealthily shorn of their responsibility as that power is defined, responsibility as placed by the great terms of the charter, is either grossly uninformed as to the history of the rise and reign of the people and the underlying principles of representative government, or he is in his nature and make-up an enemy of the Federal form of government. There can be no such thing as a great Federal Union without great and powerful states upon which that Union may rest. There can be no such thing as a free and powerful people without a virile, independent, and self-governing citizenship. The only school in God's world for such training is local self-government. It was the great principle upon which our government was founded. It is just as essential to-day as it was a hundred years ago. It was a great and fundamental truth stated by De Tocqueville when he said: "I maintain that the most powerful and perhaps the only means of interesting men in the welfare of their country which we still possess is to make them partakers in the government."

Equally impressive is the statement of one of the most profound students of our system of government, Mr. Bryce, to the effect: To the people we go sooner or later; it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend.

Shall we not begin this revival, this effort to have the states perform fully and completely the duties devolved upon them by the Constitution, by relieving them of their most demoralizing, embarrassing, and expensive duty? Let us leave these legislative bodies to the great task of building up these institutions and formulating the purposes and policies which attach so closely to and deal so intimately with the daily life of the citizen. Let us relieve them from that which often prevents for a whole session any attention whatever to state matters,

which often controls legislatures even from one session to another, which dominates their selection, which leads to vast expense the people must at last pay, which leads to faction and strife.

I urge that reflection will lead many to the conclusion who now think otherwise, that the state legislatures should be relieved of this task. . . .

In the last twenty years there have been a great many prolonged contests in state legislatures which illustrate one of the great evils of the present system. The entire session of the legislature was occupied in the electing of a Senator, to the exclusion of everything else for which they were called together. In some instances special sessions were called at great expense. In some fourteen instances states have gone without full representation here because of deadlocks in the legislature. In other instances bribery and corruption have been charged, and corruption and scandal has attached, to the session. It is not alone that direct and open bribery sometimes prevail, but that which is equally as bad more often prevails—bills and measures are traded up or killed, the public interest is sacrificed or actually bartered away, patronage and office enter into the deal, and the whole affair becomes a disgrace and is of itself sufficient condemnation of the present system.

A brief reference to some of the instances will not be uninstructive. Thus in one state, in 1900, in order to prevent the breaking of the deadlock, the Democrats and Independents joined to prevent a quorum, and for twenty-eight days they made it impossible to do business of any kind. In another state, in 1904, upon roll call, one Senator and six members of the House answered to their names. The chairman of the joint assembly then ordered the sergeant at arms to bring in the absentees, whom he reported he could not find, whereupon the assembly adjourned for lack of a quorum. In another state, in 1905, the election took place in the midst of a riot. In order to prevent the hour of adjournment before an election could be secured an attempt was made to stop the clock. The Democrats tried to prevent this; the Republicans tried to bring it about. A fist fight and general all-around row started; desks and furniture were torn up and destroyed; the clock was battered with inkwells and broken; the whole assembly became a yelling, infuriated mob that would have done credit to the cellar scenes where met the Jacobins in the French Revolution. Similar scenes have been enacted time and time again in many other states, and these particular instances are not cited except as an illustration of what very often happens and what may be expected at any time in any of the states of the Union. And instead of such things becoming less frequent, they are becoming more frequent. . . .

Effect of Party System.

The framers of the Constitution had no conception of the election of a Senator as it now takes place. Their idea was that the legislature would get together, not hampered by previous pledges or party obligations, deliberately look over the state, pick out some conspicuously able and competent man, and elect him. The party spirit of to-day, the dominancy of party in all such matters, was unknown to them. The party system,—and in saying this I do not condemn political parties, for they are indispensable to our form of government, —the party system has taken away all the virtues, and left all the vices, of the plan as it was left by the framers. Almost invariably the people have their choice of Senator previous to the meeting of the legislature. Through pledges and otherwise they communicate that choice to their agents, the members of the legislature. If the agent faithfully performs the trust reposed in him, he does nothing more than record the choice of the people who elected him. He simply acts as agent of the principal,—the voter. So in this way the plan of the fathers falls. But if the agent violates his trust and votes for some other than the choice of the people, then and only then is the election made without regard to instructions from the popular vote, as the fathers assumed it would be.

So, under our party system, the ancient principle can only operate by reason of the violation of a trust or a pledge. That is one of the very conditions which demand a change.

If the agent would always faithfully perform his duty in accordance with instructions as expressed by public opinion there would be far less need of this reform. But he does not do this. And the public demand is ignored and private interests prevail. This condition never for a moment presented itself to the framers of the Constitution. When you read the debates you do not find a single one of them anticipating the evils which a different condition of affairs have brought about. But here it is well to remember a most significant remark of Mr. Madison: "If an election by the people, or through any other channel than the state legislatures, promised as incorrupt and impartial a performance, there could surely be no necessity for an appointment by those legislatures."

A Necessary Reform.

Had they been able to foresee the evils with which we now contend, it is hardly to be doubted what they would have done. But they were not providing against the evils with which we contend, for without Divine power they could not foresee them. But these conditions have now arisen. The remedy is simple and plain. Ought we not therefore to make the change. I believe with Edmund Burke, "that a state without the means of some change is without the means of its conservation."

The same thought is well expressed by the late Senator Hoar, who said: "I do not, of course, claim that the people cannot now amend or that they cannot now improve our Constitution. That Constitution would itself be a failure if the experience of a hundred years under its operations found the people unfitted to improve it. The lives of our fathers could have been of little worth if under the Constitution they framed there had not grown up and flourished a people who were also fit to deal with the great fundamental constitutional principles of the state. The men who entered upon the untried field of providing by written enactment what were the boundaries and limits of constitutional power and constitutional authority in the state have left children who, after a hundred years of trial, need not fear to approach and deal with the same great problems."

I assert, and I now challenge the presentation of anything to the contrary, that such a change would not work any change in the fundamental principles of government. The checks and balances are still there. The time and deliberation and conservatism are still there. The equal representation of the states is still there. The individuality and the representation of the whole state is still preserved.

The constitutional limitations imposed by the sovereign power, the provisions in behalf of individual liberty, are still preserved. The whole thing may be summed up in this,—the principal has discharged the agent because the agent was incompetent, and the principal will now do precisely what the agent was authorized to do. Again I quote from Edmund Burke: "Better to be despised for too anxious apprehension than ruined by too confident a security."

Finally, is it not our duty to give some consideration and some heed to the long-standing, well-sustained, and almost universal demand of the people for this change? Not because the people demand it and therefore out of fear we should obey, but because in a demand thus made for more than half a century there must be something of that justice and wisdom for which every believer in a republican form of government must have a profound respect. I cannot get away from the belief that in all these great matters which involve not technical knowledge, but rather a broad and wholesome principle of clean and efficient government, the surest and safest guide is the deliberately formed and long-sustained judgment of the people.

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Editorial Comment

"All politics and all legislatures, all courts and judges and prisons, serve merely the one purpose, to realize the will of the community."—Hugo Munsterberg.

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Edited by Asa W. Russell.

The Progressive Tide.

THE careful observer cannot fail to be impressed with the widespread feeling of political unrest which exists not only in the United States, but throughout the world. We are living in an age of political revolution. Profound forces, social, political, and economic, are urging the half-tried experiment of democracy to its ultimate. The demand for popular government is being voiced in many ways. Direct legislation and the recall, direct primaries, direct election of United States Senators, presidential preference primaries, and equal suffrage, all symbolize the tendency to place the control of governmental affairs to a greater extent in the hands of the people.

Mr. Stephen S. Gregory, in his annual address as President of the American Bar Association, referred to the rise of the progressive tide. He said in part:

"It is quite obvious that we live in a time of much political and governmental activity. No doubt the importance and gravity of controversy is often exaggerated by those who participate in it. In the perspective of history, political and popular conflict loses somewhat of that sharp outline and aspect of almost revolutionary violence, which it wears while the battle is on. Still, making all due allowances, when we reflect that two amendments to our national constitution are now apparently soon to be adopted; when we consider the radical changes in their organized law, already secured in several states and contemplated in others; when we remember the marked innovations in political methods, accomplished by the direct primary extended this year for the first time to the selection of presidential candidates, it is not necessary to look beyond the extensive confines of our land, nor to consider changes elsewhere, scarcely less significant, to establish the proposition that we live in an age of political revolution.

"Now we seem to have reached a time when the very Constitution and frame of our government is under critical examination. The necessity for those safeguards in administration which have been deemed essential to the security of rights to life, to liberty, and to property, is called in question. The progressive tide, stayed by constitutional barriers, threatens now to sweep them all away; to spread itself widely over field and valley, carrying with it old forms, old institutions, and old ideas, bringing in its train, according to contending views,

either devastation or blessing, but concededly involving sweeping and radical change."

Mr. Gregory reviewed the work of the recent session of Congress, and said that perhaps the most significant act was the adoption of a joint resolution proposing to the states an amendment to the Constitution providing for the election of members of the Senate by direct vote. Referring to the Lorimer Case as strengthening the popular sentiment for the direct vote, Mr. Gregory said:

"It is precisely this kind of gross abuse of power and dereliction in duty by representatives to their constituents which has contributed so largely to the failure of representative government, and destroyed the confidence of the American people in the entire representative system.

"There would seem to be but little doubt, judging from the present temper of our people, that this amendment will pass, although it will undoubtedly meet with considerable resistance in certain quarters."

Referring to the action of certain states in extending suffrage to women, Mr. Gregory said:

"It certainly seems as if women were entitled to self-government as well as men. It is the Jeffersonian idea, and I believe it to be the true one, that all men are entitled not merely to wise government, not merely to honest government, not only to good government, but to self-government."

"It is difficult to see, how, consistently with this principle, which lies at the foundation of American institutions, the political rights accorded to men can be denied to women. I am satisfied that if the ladies make up their minds with any considerable degree, of unanimity that they want the ballot, they will get it; and at the present time there are strong indications that they have decided that they are entitled to and should have this vital and important political right."

We have come to days full of perplexities—full of practical problems—the outcome of which can hardly fail to result in placing the real government in the hands of the people themselves.

Procedural Reform.

WE are much gratified in being able to state that, by a unanimous vote and considerable enthusiasm, the American Bar Association at the recent meeting in Milwaukee, indorsed a resolution presented by Mr. Thomas W. Shelton, of the Norfolk (Virginia) Bar, requesting Congress to vest in the Supreme Court of the United States the power to prepare and put into effect a complete correlated system of pleading and procedure on the common-law side. This was the burden of Mr. Shelton's learned paper on "The Relation of Judicial Procedure to Government," which appeared in the April number of CASE and COMMENT.

Mr Shelton's resolution is as follows:

Whereas, § 914 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684) has utterly failed to bring about a general uniformity in Federal and state proceedings in civil cases; and

"Whereas, it is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court;

"Now, therefore, be it and it is hereby resolved:

First. That a complete uniform system of law pleading should prevail in the Federal and state courts;

"Second. That a system for use in the Federal courts, and as a model, with all necessary rules of practice or provisions therefor, should be prepared and put into effect by the Supreme Court of the United States;

"Third. That to this end, § 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted;

"Fourth. That for the purpose of presenting these resolutions to Congress and otherwise advocating the same in every legitimate manner, there shall be appointed a committee of five members to be selected by the President, to be known as 'The Committee on Uniform Judicial Procedure.'"

The committee on judicial administration and remedial procedure, in its report recommending the resolution, said:

"The subject-matter of the resolution is one of great importance. It is true that § 914 of the Revised Statutes has failed to bring about any uniformity in proceedings in civil cases. It is true that uniformity in this respect is most desirable; and the inferenece drawn from the resolutions seems to your committee justifiable; namely, that if a complete uniform system of law pleading and procedure should prevail in the Federal courts, —a system carefully modeled by the Supreme Court of the United States,—it would in time induce the several states to adapt their own systems of pleading to such model."

President Frank B. Kellogg will name the members of the committee which will have charge of this movement, and the resolution will be formally presented to Congress immediately after it convenes. The resolution will have the earnest support of many prominent members of the American Bar Association. It is to be hoped that Congress will relieve itself of the burden upon it, and will allow the Supreme Court to do the work.

The Law of the Air.

IN his annual address as President of the Pennsylvania Bar Association, Mr. George R. Bedford made the following interesting comment upon the present status of aerial law:

"*Cujus est solum ejus est usque ad cælum* is one of the cardinal rules of real property firmly fixed in the common law, and freely rendered is, 'he who owns the soil owns everything above and below.'

"This rule acquires greatly increased importance in these days of the airship, when it would seem that every aviator commits a technical trespass in every flight that he makes. It is interesting to consider what might happen if some enterprising individual or association of individuals should acquire, by purchase from the owners of the soil about New York to Philadelphia, for example, the exclusive right to navigate the superincumbent air, and should apply for injunctions against all other aviators to enjoin threatened trespass.

"It is said that certain florists in New England, apprehensive of injury to their greenhouses in case of accident to the airship, threatened to apply to the court for protection, and were only silenced when bond was given to indemnify them against injury.

"These considerations suggest that some modification of the law as affecting private rights may be necessary.

"A more important question is the extent of the state and national rights over the air, the space it occupies, and how far government may exercise control of aerial navigation, inasmuch as in case of war, airships may be made to play an important part both for purposes of reconnaissance and the purposes, more important still, of direct attack. It is obvious that private rights may in the future have to be subordinate to the public welfare, and such welfare may, and in time probably will, require that the government exercise such dominion over the air as is possible to afford protection against an enemy's attack.

"The matter is well worthy of consideration when it is remembered that only twenty-seven of the forty-four states represented at the second Hague conference would give up the right to discharge explosives from airships.

"With this menace guarded against so far as possible, it will doubtless be regarded as desirable to allow untrammeled freedom of flight to aviators, and to recognize the mutual advantage of unimpeded international intercourse.

"To accomplish all these ends, it will probably sometime happen that government will assert and exercise control over aerial navigation—private land owners being compensated for any damages they may suffer, it being obvious that such damages must be only of trivial character.

"In connection with the law of the air, another matter that claims our attention is some proper regulation of wireless telegraphy.

"In the greatest marine disaster in the world's history, happening only two months ago, hundreds owed their lives to the succor that came in response to appeals from the sinking ship through the medium of wireless telegraphy. It has been asserted that earlier help might have come, and other lives might have been

saved, except for the interference of the amateur stations on shore, and the consequent diversion and dispersion of messages intended for vessels on the ocean that might have come to the rescue.

"The subject is one of grave importance, and is already receiving at the hands of Congress and of the general public the most serious consideration."

In Switzerland, where the regulation of automobile transit and aerial navigation is at present within the exclusive jurisdiction of the cantons, although their chief employment is intercantonal, it is proposed to revise the Constitution so as to place these subjects within the control of the Confederation or central government. We are indebted to Mr. Denys P. Meyers, member of the International Juridic Committee on Aviation, for a copy of the proposed revision, which reads as follows:

Art. 37*bis*.—The Confederation has the right of enacting police prescriptions regarding automobiles and cycles. Legislation on aerial navigation is within the domain of the Confederation."

The message accompanying this proposed article is in part:

"The rapid progress made in these last years in aeronautics, and the projected enterprises for aerial transportation to which they have given birth, create a new situation which seems to render it necessary for the Confederation to assume without delay the obligation of taking on this matter measures which will give it a free hand.

"The rights that the Confederation already possess in this field by virtue of the postal regulations are insufficient, for they contemplate only the regular and periodic transportation of persons; and it is more than doubtful if, by means of the concession provided for in art. 7 of the law on postal regulations of April 5, 1894, (art. 7 of the project of law at present pending before the chambers), we can take all measures necessary to safeguard the interests and security of the country.

"From the point of view of the constitutional division of competence between the Confederation and the cantons, the granting of this right of legislation to the Confederation justifies itself, because, on the one hand, it is evident that legislation on aerial navigation, as well as and more than that on railroads, must embrace all the territory of the country, and cannot in any manner be limited by cantonal frontiers; and, on the other hand, there is every indication that this matter will be, in the near future, the subject of international accords for the conclusion and execution of which the Confederation should be provided in advance with full and complete legislative competence.

"The questions of law which are raised by the recent entry of aerial navigation into the domain of practice being still hardly clear, it cannot be said in any definite manner upon what points legislation relative thereto will have to be passed. We will take the trouble to cite here by way of illustration a few of the points which seem, in the present state of the science, to be the proper subject of municipal or international regulation.

"First, the Confederation must possess the right of granting or refusing authorization to undertake aerial journeys, not only for reasons of police control or public security, but for reasons of a military, fiscal, sanitary, and customs police character, or all other reasons of general interest. It must for the very strongest reasons be able to regulate the circulation of lighter, or heavier than air machines from all points of view, to control their construction and their condition, the quality and nationality of their crews, to fix points of landing, to determine forbidden zones, to establish rules relative to traveling, to matriculation, to papers on board, to signals, etc. On the other hand, it will have numerous questions of civil and penal law, of procedure and of jurisdiction to which the new method of locomotion has or will give birth. As we have indicated, it is probable that many of these questions will be solved by means of international agreements. For those which will have to be regulated by national legislation, their solution will be the more necessary and urgent because Switzerland does not possess any maritime law which could be applied by analogy."

Among the New Decisions

Precedent is a fruit of reason ripened by time—Baldwin

Alteration of instruments — filling blank — implied authority. The right to fill blanks in written instruments after execution and delivery is said, in Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251, to be based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker.

The decisions treating of implied authority to fill in the name of a grantee or mortgagee in a blank left for that purpose at the time of delivery are discussed in the note accompanying the foregoing case in 38 L.R.A.(N.S.) 423.

Appeal — variance — indictment and proof — name. That variance between indictment and proof in the surname of deceased in a homicide case may be raised for the first time on appeal, and is reversible error, is held in the Mississippi case of Clark v. State — Miss. —, 57 So. 209, annotated in 38 L.R.A. (N.S.) 187.

Assault — demonstration by mob — liability. That a member of a mob which, by threats and hostile demonstrations, compels a person to seek refuge in his home, and who fires a pistol at him while there, is liable in damages for assault and trespass, is held in Saunders v. Gilbert, 156 N. C. 463, 72 S. E. 610, 38 L.R.A.(N.S.) 404, which seems to be a case of the first impression.

Attachment — absence of indebtedness — effect. The fact that no indebtedness is in fact due at the time an attachment is sued out in a suit to recover a pretended indebtedness is held in the Iowa case of Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, not to show that the attachment was wrongful, so as to support an action on the bond, where the statute requires, as a basis for such action, not only that the attachment was wrongful, but that there was no reasonable cause to believe the ground upon which the same was issued to be true.

The case law pertaining to want of probable cause to believe the alleged ground of attachment, as a condition of an action for a wrongful attachment, is discussed in the note appended to the foregoing decision in 38 L.R.A.(N.S.) 120.

Attorney — right to terminate relation. An attorney at law employed for an indefinite period and for a contingent fee is held in the Louisiana case of Louque v. Dejan, 129 La. 519, 56 So. 427, annotated in 38 L.R.A.(N.S.) 389, to be a mandatary, whose power is revokable, as it is not coupled with an interest in the cause of action; and the principal may terminate the relationship of attorney and client at will.

Carrier — refusal to deliver corpse at night — liability. The duty of a carrier as to transportation of corpses was considered in Adams Exp. Co. v. Hibbard,

145 Ky. 818, 141 S. W. 397, annotated in 38 L.R.A.(N.S.) 433, holding that an express company's rule not to deliver freight, including dead bodies, to consignees in the night at stations where no night office is maintained, is reasonable, and such company cannot be held liable in damages for decomposition of a body carried to the nearest station maintaining a night office, and forwarded to destination by a day train, where, by prepayment of charges and express arrangements, night delivery at destination might have been secured.

And the mere fact that the express agent at the place of destination had notice of the anticipated arrival of a dead body on a night train after office hours, and that the consignee was ready and willing to pay the transportation charges, does not render the carrier liable for failure to deliver the body from the train contrary to its rule, if no arrangement for such delivery was made with the agent.

Conditional sale — noncompliance — bankruptcy — reclaiming property. The vendor in a conditional sale, having reserved title to the property so sold in the bill of sale, which is duly recorded, is held entitled, in Myrick v. Liquid Carbonic Co. 137 Ga. 154, 73 S. E. 7, annotated in 38 L.R.A.(N.S.) 554, where the conditions of the sale have not been fulfilled so as to pass title to the vendee, to assert title in an action of trover against a purchaser of the property at a bankruptcy sale, where the trustee sells the property of the bankrupt free from liens and encumbrances; it not appearing that the vendor has done any act which would estop it from such assertion of its title. Mere failure by the vendor to claim the property or assert its title thereto would not operate as such estoppel. Nor would the proof of an unsecured claim founded upon an open account operate as an estoppel; it not appearing that the vendor participated in the proceeds arising from the sale of the property which it sold to the bankrupt with a reservation of title in the vendor, the conditions of the sale not having been fulfilled.

Conspiracy — combination to control insurance rates. A combination of fire insurance companies and associations doing business in a certain city, to create and maintain a monoply in the fire insurance business in such city, and to regulate and control the insurance rates, is held not a criminal conspiracy, in the Virginia case of Harris v. Com. — Va. —, 73 S. E. 561, 38 L.R.A.(N.S.) 458.

The cases dealing with the legality of a combination among underwriters are gathered in a note in 24 L.R.A.(N.S.) 153.

Corpse — exclusion of father from burial service — liability. That a son-in-law has no right of action because he is maliciously excluded by his father-in-law from the latter's premises during the burial service of his child, the custody of which was awarded to the mother in divorce proceedings, and which was taken by her to reside at her father's house, is held in the Iowa case of Rader v. Davis, — Iowa, —, 134 N. W. 849, 38 L.R.A.(N.S.) 131, which seems to be one of the first impression.

Damages — exchange of property — misrepresentation of value. The damages for misrepresenting the value of property exchanged for other property is held in the Iowa case of Stoke v. Converse, — Iowa, —, 133 N. W. 709, to be the difference between what the value of the property would have been had it been as represented, and what it actually was, regardless of the value of the property given in exchange for it.

The weight of authority as disclosed by the note accompanying this case in 38 L.R.A.(N.S.) 465, approves this statement of the rule.

Damages — expulsion from bathing establishment. That one unlawfully expelled from a bathing establishment under humiliating circumstances, after having paid for accommodations therein, may, in an action for breach of contract, recover damages for the indignity attending the expulsion, is held in Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736, which is accompanied in 38 L.R.A.(N.S.) 204, by a note in which the recent

cases on humiliation as an element of damages for exclusion from a place of amusement are gathered, the earlier cases having been presented in 14 L.R.A. (N.S.) 1242.

Damages — punitive — failure to furnish sleeping car accommodations. That punitive damages may be allowed for the wanton failure of a railroad company to furnish a passenger with sleeping car accommodations which it has agreed by telegraph to do upon his purchasing transportation tickets, is held in the South Carolina case of Speaks v. Southern R. Co. — S. C. —, 73 S. E. 625. The recent cases on liability for failure to furnish a passenger with sleeping car accommodations are gathered in the note accompanying the report of this decision in 38 L.R.A.(N.S.) 258, the earlier cases having been collected in a note in 5 L.R.A.(N.S.) 1012.

Deed — want of acknowledgment — record — effect. A conveyance which has not been acknowledged or proved so as to be entitled to record, but which has in fact been recorded in the office of the register of deeds, is held in Nordman v. Rau, 86 Kan. 19, 119 Pac. 351, to be void as to one who subsequently buys the land with actual knowledge of the contents of the record, if he is otherwise an innocent purchaser for value.

This decision, as appears by the note which accompanies it in 38 L.R.A. (N.S.) 400, is against the weight of authority.

Divorce — trustee for alimony. It is held in the Utah case of Blair v. Blair, 121 Pac. 19, annotated in 38 L.R.A. (N.S.) 269, that a trustee should not be appointed for the fund allowed a wife as alimony upon the granting of a divorce, where none of the parties ask for a trusteeship, and there is nothing to show that the wife is incompetent or a spendthrift, although it appears that the appointment of a trustee would be for her best interests.

Evidence — will — intention of testator — fixing boundaries. It is held in Napier v. Little, 137 Ga. 242, 73 S. E. 3, not competent to allow the scrivener who writes the will to testify what the intention of the testator was as to the devise of certain lands, or what the scrivener's intention was with reference to describing the boundaries of the lands devised. But where the boundaries of lands devised by a will are fixed, and this fact is patent upon the face of the will itself, while the description of the land comprised within those boundaries is ambiguous, parol testimony is admissible to adjust the description to the boundaries so fixed, but not for the purpose of changing the boundaries.

The decisions dealing with the competency of a scrivener or draftsman to testify as to his own or the testator's intention are collected in the note accompanying the foregoing case in 38 L.R.A. (N.S.) 91.

Foreign corporations — noncompliance with law — contract — validity. A contract made by a foreign corporation which has not complied with the local law so as to be entitled to do business in the state, upon which the statute deprives it of the right to maintain an action, is held in Mahar v. Harrington Park Villa Sites, 204 N. Y. 231, 97 N. E. 587, annotated in 38 L.R.A.(N.S.) 210, not void so as to entitle the other contracting party to recover money paid upon it, on the theory that there was a failure of consideration.

Highway — crossing — duty of operator of automobile and pedestrian. That a pedestrian is not bound to look both ways and listen before attempting to cross a street at a regular crossing, although the street at that point is much used by automobiles, but his duty is to use such reasonable care as the case requires, is held in Baker v. Close, 204 N. Y. 92, 97 N. E. 501, which also decides that the driver of an automobile must approach street crossings with his machine under control.

The considerable number of cases treating of the reciprocal duty of the operator of an automobile and of a pedestrian to use care are collated and discussed in the note accompanying the foregoing decision in 38 L.R.A.(N.S.) 487.

Husband and wife — desertion — support of family — action for reimbursement. That a woman who has been deserted by her husband may, since the passage of the married women's acts, maintain an action against him to recover, according to his pecuniary ability, the amount which she has expended from her separate estate for the necessary support of herself and her children, although the funds are the outcome chiefly of her own labor, is held in DeBrauwere v. DeBrauwere, 203 N. Y. 460, 96 N. E. 722, annotated in 38 L.R.A.(N.S.) 508.

Infant — commitment to institution — mother's marriage with negro. The question of the power to deprive a parent who had intermarried with a colored person, of the custody of children, was presented for the first time in Moon v. Children's Home Soc. 112 Va. 737, 72 S. E. 707, 38 L.R.A.(N.S.) 418, holding the fact that the mother of gently nurtured white girls marries a man with negro blood in his veins insufficient in amount to make the marriage invalid under the laws of the state, and that because thereof they will be deprived of white society and compelled to associate with persons of mixed blood, does not justify the authorities in committing them to the custody of an institution, under a statute permitting such commitment of children when, by reason of neglect or vice of the parents, they are growing up without education or salutary control, and in circumstances exposing them to a dissolute or vicious life.

Injunction — frightening game — nuisance. The owner of an island valuable only for hunting purposes is held in the Virginia case of Meredith v. Triple Island Gunning Club, 73 S. E. 721, not entitled to enjoin the use of an artificial blind by a citizen of the state, who as one of the public has a right to fowl on the waters where his blind is situated for hunting purposes, merely because the blind is so located that the firing of guns there will intercept the flight of game and prevent its passing over complainant's property.

Nor can the owner of adjoining property enjoin the erection and use of a blind in the public waters of the state from which to shoot wild fowl, on the ground that it constitutes a public nuisance.

The recent cases on injunction against hunting or fishing on navigable waters are gathered in the note appended to this decision in 38 L.R.A.(N.S.) 286, the earlier cases having been collected in a note in 17 L.R.A.(N.S.) 1236.

Insurance — explosion following fire — liability. That an explosion is caused by a fire in a building is held in Wheeler v. Phenix Ins. Co. 203 N. Y. 283, 96 N. E. 452, not to relieve the insurer from liability for the loss, under a policy insuring against loss by fire except loss caused directly or indirectly by explosion of any kind, unless fire ensues, and in that event for the damage by fire only.

The recent cases concerning the liability of an insurer for loss caused by an explosion are appended to this decision in 38 L.R.A.(N.S.) 474, the earlier cases having been collected in a note in 19 L.R.A.(N.S.) 594.

Insurance — indemnity — failure to give immediate notice of claim. One insuring against employers' liability is held in the Arkansas case of Hope Spoke Co. v. Maryland Casualty Co. 143 S. W. 85, not entitled to avoid his liability on the policy, because immediate notice of the accident was not given him, as required by the terms of the policy, if it was given to the broker through whom the policy was procured, under the honest belief that he represented the insurer, and by him forwarded to the wrong company, if the insurer finally receives it in ample time to investigate the claim, so that it suffers no loss by reason of the delay, and immediate notice is not made a condition of liability by the contract.

The decisions dealing with the effect of delay in giving notice of claim under an employer's indemnity policy are collated and discussed in the note accompanying this decision in 38 L.R.A. (N.S.) 62.

Judicial sale — holiday — postponement of sale. That a sale of lands made by

a sheriff on a day not named in the notice is illegal, and should be set aside, notwithstanding the fact that the day named fell on Labor Day, and the sale was held the day following, is laid down in the Oklahoma case of McLaughlin v. Houston-Hudson Lumber Co. — Okla. —, 120 Pac. 659, annotated in 38 L.R.A. (N.S.) 249.

Life insurance — risk — death by execution for crime. Death by a legal execution for crime is held in Northwestern Mut. L. Ins. Co. v. McCue, 223 U. S. 234, 56 L. ed. —, 32 Sup. Ct. Rep. 220, 38 L.R.A.(N.S.) 57, not covered by a policy of life insurance, though the policy contains no provision excepting such manner of death from the risks covered by it.

The earlier cases upon the effect of the execution of the insured for crime, on the right to recover life or accident insurance, are collated in a note in 14 L.R.A.(N.S.) 356.

Mortgage — invalid foreclosure — securing tax title. No case has been found presenting the question decided in National Surety Co. v. Walker, 148 Iowa, 157, 125 N. W. 338, 38 L.R.A.(N.S.) 333, holding that a mortgagee who has bid in the property at a foreclosure sale under a decree which is subsequently reversed cannot, while the decree remains unreversed, obtain a tax title to the property which will be good against the mortgagor or the holders of prior tax liens.

Municipal corporation — operation of quarry — absence of authority — liability for injury. A municipal corporation which without charter authority is attempting to operate a stone quarry to secure material for the repair of its streets, is held in the Virginia case of Radford v. Clark, 73 S. E. 571, not liable for injuries due to the frightening of a horse being driven on a highway, by blasting in the quarry, although the duty to maintain its streets in order is imposed by charter.

The decisions pertaining to the liability of a municipality for a tort in connection with a quarry worked by it, are gathered in the note appended to the foregoing case in 38 L.R.A.(N.S.) 281.

Pardon — municipal authorities — power to remit penalties. The constitutional pardoning power of the govenor is held in the Mississippi case of Allen v. McGuire, 57 So. 217, annotated in 38 L.R. A.(N.S.) 196, not to prevent the legislature from conferring upon municipal authorities the power to remit penalties for violation of municipal ordinances.

Physician — practising medicine — chiropractic. A statute making it a misdemeanor to practice without license medicine, which is defined as prescribing or directing for the use of any person "any drug or medicine or other agency" for the treatment or relief of bodily injury, deformity, or disease, is held in the Arkansas case of State v. Gallagher, 143 S. W. 98, 38 L.R.A.(N.S.) 328, not to apply to the practice of chiropractic, which is a system of treatment by hand manipulation.

Principal and agent — intoxication of agent — grounds for discharge. Intoxication covering a period of two or three months, on the part of an agent employed to purchase cotton, to such an extent as to incapacitate him from business, is held in the Mississippi case of Willis v. Lowery, 57 So. 418, annotated in 38 L.R.A.(N.S.) 339, to justify his discharge before the termination of the contract period, although he claims to have quit drinking.

Schools — sick teachers — allowance of salary. Under a statute vesting in a board of education the management and control of schools, and giving the board power to determine all questions of general policy relating to the schools, it is held in District of Columbia v. Dean, 38 App. D. C. 182, that the board may allow sick teachers full pay for a reasonable time, such as sixty days, upon their supplying substitutes from the eligible list of teachers.

The right of school teachers to pay during absence is considered in the note which accompanies this decision in 38 L.R.A.(N.S.) 513.

Slander — physician — informing patient that she is pregnant. A physician who, in good faith, but acting under mistaken

diagnosis, informs an unmarried woman who has come to consult him professionally, that she is pregnant, in the presence of friends who have accompanied her to the office, is held in Brice v. Curtis, 38 App. D. C. 304, annotated in 38 L.R.A. (N.S.) 69, not liable for slander, since the communication is privileged.

Specific performance — portion of larger tract — identification — necessity. That a contract to convey a specified number of acres out of a larger tract in case it was inherited by the intending grantor cannot be specifically enforced, if there is nothing to identify the particular property to be conveyed, is held in Wetmore v. Watson, 253 Ill. 88, 97 N. E. 237, 38 L.R.A.(N.S.) 331.

Street railway — contract for special rate — suburban property — definiteness. A promise by a street railway company to maintain a special rate, the amount and duration of which is not specified, to suburban property which it sells to one proposing to develop it for homes, is held in the Maryland case of Arundel Realty Co. v. Maryland Electric R. Co. 116 Md. 257, 81 Atl. 787, annotated in 38 L.R.A.(N.S.) 157, to be too indefinite for enforcement, and therefore the purchaser has no right of action in case, after he has partially disposed of the property, the rate first established is more than doubled, so that demand for the property ceases and its value is greatly depreciated.

Telephone — charter duty — reasonable hours. The power of the government or its agencies to regulate days and hours of service of telephone companies seems to have been considered for the first time in Twin Valley Teleph. Co. v. Mitchell, 27 Okla. 388, 113 Pac. 914, 38 L.R.A. (N.S.) 235, holding that a telephone company is required to operate its exchange during reasonable hours on every day in the week, including Sunday, in order to comply with its charter and franchise obligations.

Vendor and purchaser — good title — unreleased trust deeds. A good title is defined in Justice v. Button, 89 Neb. 367, 131 N. W. 736, to be one that can be sold to a reasonably prudent man who might desire the property, or a title that can be mortgaged to a person of reasonable prudence as security for the loan of money.

This decision, which is accompanied in 38 L.R.A.(N.S.) 1, by an exhaustive note on what is a marketable title, holds that unreleased and unsatisfied trust deeds executed to secure the payment of a debt constitute such a defect in the title that a vendee will be excused from accepting it, although upon the face of the record the statute of limitations may have barred the creditor or the trustee from foreclosing the deed, or from selling the land thereunder.

Wills — failure of witness to see signature — effect. That persons affixing their signatures as witnesses to a holographic will at the request of testator did not see the signature of testator thereto, and were not expressly told that he had signed it, is held in the Michigan case of Dougherty v. Crandall, 134 N. W. 24, not to destroy the validity of the will.

Whether it is necessary that witnesses see the testator sign or that they see his signature, is considered in the note accompanying the foregoing case in 38 L.R.A.(N.S.) 161.

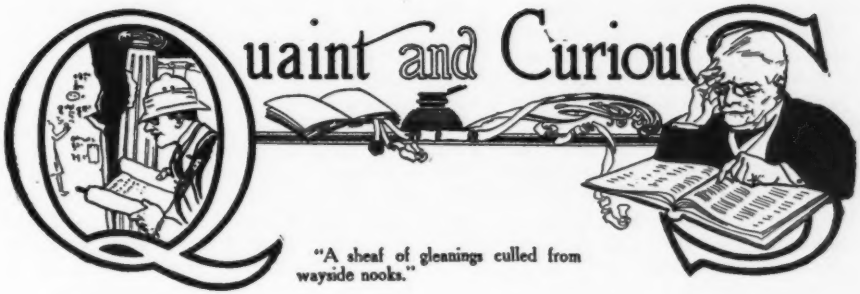
Recent English and Canadian Decisions

Contracts — agreement to pay mother annuity conditioned upon promisor's appointment as guardian — validity. That an agreement made by the grandfather of a child to pay the mother of the child a fixed sum annually on condition that he be appointed the guardian of the child is not void as against public policy, where such appointment is merely asked for as a guaranty that the education of the child shall be finished in an institution named by the grandfather, and there is no desire otherwise to devest the mother of her rights and liabilities with respect to the child, is held in Chisholm v. Chisholm, 45 N. S. 288, the court holding the facts to differentiate the case from one where the mother contracts to abdicate absolutely the functions devolving upon her as the mother of the child, and to be devested of all her rights with respect to the child.

Criminal law — twice in jeopardy — retrial where first conviction illegal. One whose conviction is a nullity by reason of the omission to swear the chief witness against him is not thereby so put in peril that the convicting magistrate may not, upon his attention being called to the illegality, proceed to a retrial. Rex v. Marsham [1912] 2 K. B. 362.

Mortgage — right of one advancing money to pay off, to priority over intermediate undisclosed encumbrance. An interesting decision upon the question as to whether a mortgage which has been paid off in ignorance of a subsequent encumbrance on the property may be treated in equity as having been kept alive for the benefit of a purchaser of the equity of redemption and his mortgagee, who together advanced the money for the discharge of the mortgage, was made by the English Court of Appeals in Manks v. Whiteley [1912] 1 Ch. 735, the facts of which are as follows: The owner of property charged with two mortgages offered to sell his equity of redemption, without, however, disclosing the existence of the second mortgage. The purchaser accepted conditionally upon finding someone to advance money to pay off the mortgage. A lender was found who agreed to advance a sum of money on first mortgage, and who did advance the sum, which was paid over to the original mortgagee, the transaction being completed by three contemporaneous deeds: (1) a reconveyance by the original mortgagee to the owner; (2) a conveyance by the owner to the purchaser; and (3) a mortgage by the purchaser to the lender. The court conceived itself bound by the decision in Toulmin v. Steere, 3 Meriv. 210, 17 Revised Rep. 67, to hold that where the payer of an encumbrance is owner in fee of the mortgaged estate, and the debt is not his own debt, the presumption is that he does not intend to keep the charge alive for his own benefit, and that to rebut this presumption there must be evidence of actual intention to keep it alive. Fletcher Moulton, L. J., however, in a strong dissenting opinion, in which he examines the earlier English cases bearing upon the question, holds Toulmin v. Steere to have been wrongly decided, and characterizes as an absurdity the result of the doctrine therein, as exemplified in the present case, that a man is in greater danger from an equitable charge of which he has no notice than from one of which he has notice, because he can have had no conscious intention with regard to the former, seeing that he did not know of its existence.

Will — legacy — subsequent gift of equal amount — ademption. A testator who by his will had given a certain legacy thereafter wrote a letter to be opened after his death, inclosing a check for the amount of the legacy, and requesting the legatee to tell the executors that the check was instead of the legacy left by the will. The contents of the letter were not communicated to the legatee, but it was sealed in her presence and placed in a drawer by the testator, who called her attention to the matter and told her to open the envelop on his death. Subsequently the testator requested the legatee to get the envelop, opened it in her presence, took out the check, and, putting the letter into another envelop, sealed it and told her to keep it and open it on his death. He subsequently sent the check, or another for a similar amount, to his bankers, with instructions to place the money to the credit of a joint account in the names of himself and the legatee, with power to either party to draw. The letter was opened and read by the legatee for the first time on the testator's death. Upon this state of facts it was held in Re Shields [1912] 1 Ch. 591, that as there was nothing in the transaction to affect the conscience of the legatee and to preclude her from claiming both the legacy and the gift, and as the letter was not admissible in evidence to prove that the testator intended that the gift should be in substitution for the legacy, the legatee might claim both the legacy and the gift.



"A sheaf of gleanings culled from wayside nooks."

Harmless Error. In a suit for collection of a debt, the attorney for the defendant asked the magistrate to charge the jury that the plaintiff had to make out his case by the preponderance of the evidence, and if he did not so make it out they would have to find for the defendant; that if they found that the evidence equally balanced they would have to find for the defendant. The magistrate refused to so charge the jury, but instead charged as follows: "Gentlemen of the jury, if you cannot decide this case from the evidence, then you become a law unto yourselves, and will have to find, one way or the other, as best you can, always remembering the rule, 'Do unto others as you would have them do unto you!' " The jury came in with a verdict for the plaintiff. The defendant appealed, alleging for one thing, that the magistrate erred in refusing to charge the jury as requested, and for charging the jury as he did, in the particulars above named.

The magistrate in making his report to the higher court (as he is required to do by statute), in sending up the case, made use of the following language: "It is true I may have erred in not charging the jury as requested by defendant's learned counsel, and I may have erred in charging the jury as I did, but I assure this honorable court that the jury which tried this case was a very intelligent set of men, and I am sure that nothing I said to them had any effect one way or the other, nor anything which I might have said to them would have had any influence whatever, for they were all men above suspicion, and would have allowed nothing I said to them to prejudice them one way or the other."

Lawyers Always Specific. A newspaper can seldom state a case to suit a lawyer, and if one lawyer is satisfied the other lawyer who is a party to the suit complains, says the Great Bend Tribune. The lawyers have a way of making things so clear and plain that anyone can understand. One was asking a witness some questions, and here's what happened:

"My good woman, you must give an answer, in the fewest possible words of which you are capable, to the plain and simple question whether you were crossing the street, with the baby on your arm, and the omnibus was coming down on the right side, and the cab on the left side, and the brougham was trying to pass the omnibus, you saw the plaintiff between the brougham, cab, or omnibus, or either, or any two, and which of them respectively,—or how was it?"

A Tradename. Mr. L. Kolmen Trash-tinberg recently made declaration, before a district court in Texas, of his intention to become a naturalized citizen of the United States. He gave his occupation as that of a junk dealer. Bearing in mind that "berg" is the German word for mountain or hill, it would seem that "Trash-tin-berg" is a very appropriate name for a junk dealer.

Court Interruption in Kentucky. We suppose that Judge S. E. Jones, of the tenth judicial circuit, witnessed one transaction in his court that is without parallel. In December, 1898, while the judge and several lawyers were busily engaged in the trial of an equity case, Grover Maraman came into court with a dressed opossum and inquired for Bill Herps. The trial was stopped until Bill was found, and the sale of the opossum consummated. Bill left with his opossum and the trial proceeded.—Shepherdsville News.

The Law Was on His Side. The New York pedestrian, says the Cleveland Plain Dealer, took his time in crossing Broadway.

He knew his rights and meant to assert them.

Just the day before a learned judge had declared from the bench that pedestrians were not required by law to avoid vehicles in the streets.

The pedestrian had read this decision and knew the statutes were on his side.

He advanced smartly.

The next moment he was scraped by a motorcycle, jostled by a taxicab, hit by a runabout, bumped by a touring car, and run over by an auto truck.

He wrote to the learned judge from the hospital, detailing the facts.

And the learned judge wrote back:

"You acted strictly in accordance with the law."

Humors of the Custom House. Some of the troubles of the guardians of ports of entry are thus entertainingly described by a writer in the Boston Transcript:

There are certain beasts and birds that the Department of Agriculture is averse to, and collectors of customs are well aware of this reasonable prejudice. The importation of the mongoose, the so-called "flying foxes" or fruit bats, the English sparrow, and the starling is explicitly prohibited, and Secretary Wilson may, as he sometimes does, include any other creatures that he thinks may imperil our farms and orchards. In this particular his authority is as comprehensive and as irrefragable as that of the railroad man appealed to by two ladies who were taking home their seashore pets, a cat and a turtle. The brakeman consented to one, but hesitated about the other, and, after he had withdrawn to consult authorities, returned invigorated and, looking toward the baggage car, delivered an ultimatum. "Cats is dogs, mum," he said, "but turtles is insecks." It is matter of record that, when Secretary Wilson was told this story, he capped it with another, not so amusing, perhaps, but probably more truthful, of a Southern collector of customs who was greatly puzzled at first on receiving a consignment of frogs, but finally admitted them as "poultry," on the ground that the hind legs anyhow were good to eat.

The government is frequently at a loss, however, touching the best way to exclude or to admit. Continually there are turning up cases that puzzle the experts, as, if the reader were established at the appraisers' offices, they would puzzle him. Here, in a former administration, a lovely mummy was "put up to" them. What about her? Should she be described as a "specimen of natural history?" No, indeed, because her history was,—that is, not exactly unnatural, but not exactly history, either. Should she be denominated a manufactured article? That seemed not quite fair to Isis and Osiris, sponsors, and other gods that had doubtless had an eye on her. So the custom house admitted the lady as a preparation of anatomy.

"Pigs is pets" was Mike Flannery's conclusion, after he had suffered the series of incidents described in Mr. Butler's immortal story, "an' cows is pets, an' lions an' tigers an' Rocky Mountain goats is pets, an' the rate on thim is twinty-foive cints." Mr. Flannery did not exaggerate the demands of classification that might be thrust upon him or any other station agent. It is an episode cherished in the record of a local express, that within a year it has been asked to transport an Alderney bull as a domestic pet. And one of the transatlantic lines was desired to receive a thirty-foot boa constrictor under the same generous classification, at Rio Janeiro. Neither the bull nor the snake

"got by," but in each case the owners made complaint to the higher powers about their exclusion. It is not always a cheerful thing, therefore, to be attached to the appraisers' office or even to be associated with an express company. An embittered receiving clerk who has not cultivated the philosophy that smoothes things over on lower State street summed up his view of the situation, yesterday, with an awful, cynical twist of the lip and wrinkle of the forehead. "The public never knows what to call things," he said.

An Emancipating Decision. "There is no doubt but a woman may be permitted to drive a well-broken horse, without any violation of common prudence," declared the court, standing firmly for equal rights, in the case of Cobb v. Standish, 14 Me. 198, which was an action to recover damages sustained by the loss of a horse through a defect in the highway. The question was presented by the contention of counsel for the defendant township, that trusting a horse to be driven by a woman was conclusive evidence of want of ordinary care which would go to excuse the defendant.

Had Too Many Votes. If a candidate for public office is defeated, it is generally because of the fact that the opposing candidate receives too many votes; but according to the decision in State ex rel. Hawkins v. Cook, 62 N. J. L. 84, 40 Atl. 781, holding that the defendant was not entitled to the office of city marshal, he would have been legally elected had his opponent received more votes. One of the six members of the common council was absent at the time the election of a city marshal came up; three councilmen voted in favor of the defendant, and the mayor, who could vote in case of a tie, also voted for him. It was held, however, that there was no tie and the mayor's vote was illegal. Had the absent member been present and voted against the defendant he would, under the identical circumstances, have been legally elected.

A Lawyer of the Old School. Judge Blacker, of El Paso, Texas, who served as district judge for many years, and who retired from the bench and active practice some time ago on account of ill health and declining years, has now resumed practice. His letter head bears this unusual statement: "No disputed or litigated business received against present clients or friends." This shows a highly commendable spirit of loyalty, and is noteworthy at a time when questions of legal ethics are so universally attracting the attention of the profession.

"Don't Know Where He Is At." The situation of Fred Terron, ranchman, reminds one of the old woman of nursery rhymes, who "lived in a shoe and had so many children she didn't know what to do;" but in his case its states instead of children. Mr. Terron has the misfortune to be a resident of four states, as he sleeps in Utah, takes his meals in Colorado, which have been prepared in Arizona, and spends his evenings in New Mexico, all under one roof. When he has occasion to stop over night at a hotel outside his own states, there comes the puzzling question of registration; he is literally a man without a state.

Persistent Litigants. In spite of the name it seems to have been impossible for Carpenter and Carpenter to patch up their little differences of opinion. Three times they have been before the supreme court of the state of Michigan in an effort to settle their domestic troubles. See 154 Mich. 100, 149 Mich. 138, 19 Detroit Legal News, 370, where the supreme court of this state, in commenting upon their failure to agree and their failure to follow the advice of Justice Grant, said: "The learned justice made a commendable effort in leading these parties to the fountain, but he was unable to make them drink." "The cloud upon the child's horoscope, presented by this record, is the possibility of ultimate litigious paranoia through heredity of contagion."

From the Sublime to the Ridiculous. An amateur historian, says T. P.'s Weekly, is responsible for this: "All along the ever flowing stream of history you can discern the silent footprints of the crowned heads of Europe!"

The village reporter on the death of the village poet: "That dauntless pen shall write no more, for its eyes are closed forever!"

From the speech of a rising young politician: "The fierce light of public opinion shall dog their footsteps until it strangles them. Then shall they swallow the bitter pill and drink its very dregs."

Advice and warning from a successful man of business to a gathering of young people: "Every rung in the ladder of success is paved with slippery stones, on which only the clear head and the steady hand can retain their footing!"

The fearless suffragette was addressing a meeting of mere men. She had graphically related to them the fascinating story of the strenuous struggle the ladies had made for that most priceless of possessions, a vote,—how every obstacle had been conquered and victory was at last in sight: "We have now," she shrieked, "almost crossed the trackless desert, and the harbor lights are stretching out their arms to greet us!"

The temperance advocate was giving a striking but true picture of the vast amount of evil wrought by the demon of drink, and the fact that he occasionally got somewhat mixed in his metaphors did not derogate from the truth that underlay his remarks: "What is the greatest devastating agent of our time?" he asked. "It is the bottle, which smiles genially before your face while at the same time it is stabbing you in the back."

To the foregoing may be added the remark of an Irish lawyer who in speaking of the death of a colleague said: "He left a brilliant future behind him."

Burke once took a steep slide from the sublime into the ridiculous when, in the course of a debate in the House of Commons, in 1793, he drew a dagger and threw it upon the floor, saying: "That is what you are to obtain from an alliance with France!" In the French chamber such an act would have produced great excitement, but in Westminster it only provoked ridicule. "The gentleman has brought his knife," said Sheridan, "but where is the fork?"

A Hustler. A North Dakota attorney is playing the game with his cards laid face upwards on the table. He does not scruple to take the public into his confidence, or try to hide the methods by which he hopes to win. His envelops bear this legend:

Law Offices of
M. C. L.
L. North Dakota
Practice in all courts.
Our Motto:
Late to bed, early to rise;
Hustle all day, and advertise.

Dimensions Given. Sometimes clients express anxious solicitude as to the mental attitude, depth, and other dimensions of counsel they think of employing. A Missouri man uses the local press to inform any anxious inquirers. He advertises as follows:

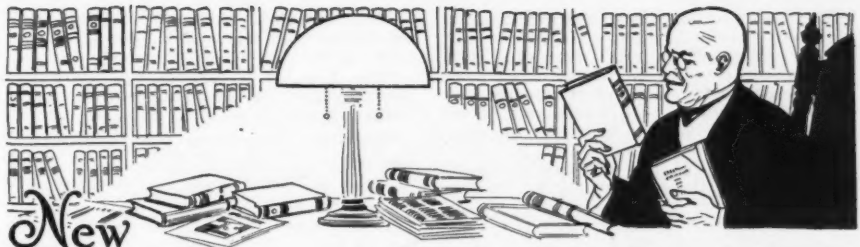
A. G. N.
Real Estate and Insurance Agt.
Notary Public
2x4 Lawyer
Office in R. Bank.

One difficulty with this re-adaptation of the Bertillon system will be the haunting doubt as to the accuracy of the measurements. If left to the man himself, his modesty may betray him into claiming less than his due.

His Reputation. Pat, an Irish distiller, was recently sworn as a witness in a case pending in the United States district court at Louisville, for the purpose of proving the reputation of three brothers who had been sworn in the same case, one of whom, Jefferson had become very wealthy by loaning money to his impecunious neighbors.

He was asked, and testified to his long acquaintance with the brothers, and his knowledge of their reputation in the community derived from what their neighbors and acquaintances said of them.

Being asked what that reputation was as thus derived, he said: "Well, judge, they pursue their own interests beyond reasonable privileges, and are rather dull on the truth,—especially Jeffie." This announcement was greeted with a roar of laughter.



New Books and Recent Articles

"The Democratic Mistake." By Arthur G. Sedgwick. (Charles Scribner's Sons, New York.) $1. Postpaid $1.09. This volume is based on the Godkin lectures of 1909, delivered at Harvard University by Mr. Arthur G. Sedgwick, of New York, the well-known publicist, journalist, legal author, and distinguished lawyer. The lectures are six in number, and the scope of the work is indicated by their titles, which are: "Government by Design," "Responsibility," "The Democratic Mistake," "Patronage and the Machine," "Limitations," and "The Suffrage." They form a brilliant contribution to precisely the issues of the present presidential campaign, and develop the contention that the cardinal democratic mistake of our political history has been the attempt to secure responsibility in public officials by popular election at short intervals.

It is Mr. Sedgwick's belief that "responsibility to the people does not necessarily mean, so far as the actual operation of the government goes, responsibility at short intervals to a popular vote. It means answerability somewhere for the performance of the duties imposed by the people upon the incumbent, tested solely by the result. Now this responsibility is not increased by any increase in the number of officials; and it is greatly diminished by the frequency of elections, and the shortening of the terms of office. On the other hand, responsibility increases with a reduction in the number of officials and elections, and the lengthening of the term of office. The same causes which produce one or other of these effects increase or diminish respectively the power of the machine by taking away from it its occupation."

Concerning equal suffrage Mr. Sedgwick observes: "Whether the suffrage is a privilege or a right or a burden, the community at large must determine on what terms and by whom it is to be exercised; but at a time that it is beginning to be perceived that we have seriously increased our difficulties by giving suffrage tasks to perform for which it is unequal, it seems rather absurd to plunge ourselves into worse complications by doubling the whole electorate, and consequently making all the machinery twice as cumbrous as it now is. Democracies, like individuals, are ruined on the side of their natural propensities; and if democracy is to be saved, it must be by its women, as well as its men, learning that we are not saved by worship of false gods. Any man in mature life who reflects upon the paltry amount of real influence a single vote means, in comparison with the authority which character, intelligence, ability, eloquence, and wealth bring to bear upon affairs, must find something very pathetic in the simplicity which imagines that responsibility in government will be increased by doubling the size of the electorate. To the machine, of course, any increase in electoral business is a direct advantage."

There is much in these lectures that will enable the reader to reach a conclusion on critical issues now before the people.

Pacific States Reports, Extra Annotated. (Bancroft-Whitney Company). 40 Books. $175.

The make-up of this valuable series of reports presents a new departure in the history of the law book world. It is printed on extra thin, high-grade paper specially made for the edition, whereby the bulk of the books is reduced to about one third. By this arrangement 135 volumes are condensed into the compass of 40 books, which occupy but 98 inches of shelf room.

A large part of the plates and the then existing stock of the reports of the Pacific coast states were destroyed in the great San Francisco fire in April, 1906. This rendered desirable the present reprint in facsimile from the original editions. The extra annotations accompanying them, if bound separately, would make about eight large volumes. This form of annotation analyzes later cases which have cited a particular case, thus determining the present value by showing how the courts of various jurisdictions have treated it. The user is frequently led to a number of later cases on the same subject, and by learning of how other and later cases have distinguished or, perhaps, overruled a particular case under consideration, he is saved from citing an undesirable authority.

Extra annotations also direct the user to the comprehensive keynotes in American Decisions, American Reports, American State Reports, and to notes in American and English Annotated Cases, Lawyers Reports Annotated, etc., any one of which may be an inclusive and conclusive brief on the specific point under investigation.

The purchaser of this edition secures all the volumes of the sets covered by the Pacific Reporter up to the beginning of the same. This new edition constitutes a truly modern working tool which no lawyer practising within the jurisdictions covered by it can afford to neglect.

Collier on "Bankruptcy." 9th ed. 1 vol. Buckram, $9. Thin paper, Flex. $10.

"Banks and Banking." (Hornbook) By Francis B. Tiffany. 1 vol. Buckram, $3.75.

Bliss's "Annotated Code of Civil Procedure of New York." 6th ed. Edited by George A. Clement. 4 vols. $30.

"Annotated Code Supplement of New York." By Amasa J. Parker, Jr. Vol. 5. Canvas duck, $7.50.

"The Law of Corporations in Oklahoma." By Kenneth C. Crain and Watson H. Caudill. 1 vol. Buckram, $6.

"Workmen's Compensation Laws and Industrial Insurance." By James H. Boyd. 1 vol. $7.50.

Tiffany on "Real Property." One-volume edition. Flexible binding, $7. net.

"Selected Cases on Trial Practice in Civil Actions at Law." With annotations. By Edson R. Sunderland. 1 vol. $4.50.

"Bills of Exceptions and Statements of Facts." (Washington) By William H. Smiley. 1 vol. Buckram, $5.

"The Law of Trusts and Trustees in Illinois." By J. B. Beckett. 1 vol. Buckram, $6.

"Canada Supreme Court Practice and Rules." 2d ed. By E. R. Cameron. $12.

Recent Articles of Interest to Lawyers

Abstracts.

"Treatment of Judicial Sales in Abstracts."—45 Chicago Legal News, 11.

Air.

"The Freedom of the Air."—24 Green Bag, 430.

Arrest.

"General Warrants."—37 Law Magazine & Review, 406.

Attorneys.

"Civic Duties of the Lawyer."—19 The Bar, 35.

"Has the Lawyer Failed in His Mission?"—45 Chicago Legal News, 13.

"Solicitor Acting for Opponent of Former Client."—48 Canada Law Journal, 444.

"The Lawyers of Dickens-Land."—24 Green Bag, 379.

Automobiles.

"Family Use of Automobile."—45 Chicago Legal News, 16.

Bankruptcy.

"What are the Rights of the Bankrupt's Trustee to His Life Insurance Policies?"—24 Green Bag, 419.

Banks.

"The Law of Banking."—29 Banking Law Journal, 700.

Bills and Notes.

"The Negotiable Instruments Law."—29 Banking Law Journal, 665.

Biography.

"Characteristic Anecdotes of Lincoln."—Century Magazine, September 1912, p. 697.

Constitutional Law.

"Remaking a Constitution."—The Outlook, August 24, 1912, p. 906.

"Constitutional Morality. (Constitutional restraints.)"—45 Chicago Legal News, 4.

Courts.

"The Judges, the Lawyers, and the People."—The Outlook, August 31, 1912, p. 1003.

"The People and the Courts."—The Outlook, August 17, 1912, p. 855.

"The Courts and the Labor Question."—19 Case and Comment, 261.

"The Attitude of Our Courts towards Labor."—19 Case and Comment, 265.

"The Court of Domestic Relations of Chicago."—3 Journal of Criminal Law and Criminology, 400.

Criminal Law.

"Some Fundamental Problems of Criminal Politics."—3 Journal of Criminal Law and Criminology, 347.

"The Treatment of Crime—Past, Present, and Future."—3 Journal of Criminal Law and Criminology, 376.

"Responsibility of Children in the Juvenile Court."—3 Journal of Criminal Law and Criminology, 365.

"Negro Crime and Strong Drink."—3 Journal of Criminal Law and Criminology, 384.

Democracy.

"Democracy in Government."—The Outlook, August 24, 1912, p. 979.

"Democracy in Industry."—The Outlook, August 17, 1912, p. 874.

Drains and Sewers.

"Compensation for the Obstruction of Streets during the Laying of Sewers."—76 Justice of the Peace, 363.

Evidence.

"Circumstantial Evidence."—37 Law Magazine and Review, 441.

"Questioned Ink Marks—Human Dynamograms."—75 Central Law Journal, 108.

Health.

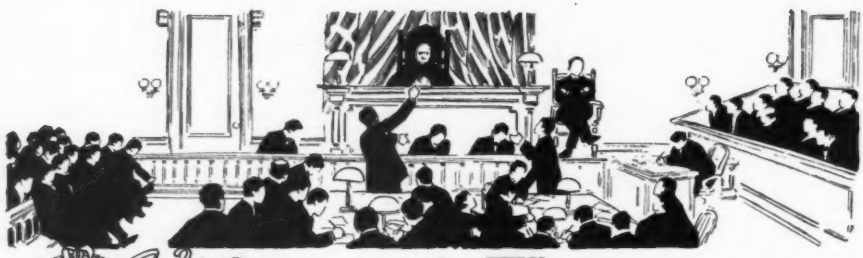
"Local Authorities and the Campaign against Tuberculosis. I."—76 Justice of the Peace, 398.

Imagination.

"The Uses of Imagination in Business."—Century Magazine, September, 1912, p. 787.

Immigration.
"Shall America Restrict Immigration?"—19 Case and Comment, 270.
Infants.
"The Rights—and Wrongs—of Parents under the Education Acts."—37 Law Magazine and Review, 397.
Initiative and Referendum.
"The Initiative and Referendum."—19 The Bar, 23.
Intoxicating Liquors.
"The 'Eagle' Decision."—76 Justice of the Peace, 361.
Labor.
"The Department of Labor: Capital and Labor Must Be Friends."—19 Case and Comment, 245.
"Labor's Fighting Legionaries on the Legal Field: A Retrospect and Prevision."—19 Case and Comment, 233.
"Progress and Labor."—19 Case and Comment, 257.
"Labor Legislation and the Recall of the 'Judicial Veto.'"—19 Case and Comment, 225.
"Trade Unions and Prison Labor."—19 Case and Comment, 240.
Law's Delay.
"The Burrell Oates Case."—3 Journal of Criminal Law and Criminology, 407.
Liberty.
"Individual Liberty under the Commonwealth."—37 Law Magazine and Review, 412.
Literary Property.
"Private Letters."—133 Law Times, 324.
Master and Servant.
"Future Liability of Employer to Employee for Personal Injuries."—19 Case and Comment, 249.
"Accident Due to Workman's Disobedience."—48 Canada Law Journal, 449.
"The Workman's Compensation Law."—19 Case and Comment, 253.
"Basic Theory of the Illinois Workmen's Compensation Law."—19 Case and Comment, 268.
Municipal Ownership.
"Community Control in Canada."—World's Work, September 1912, p. 578.
Panama Canal.
"The Family and the Panama Canal."—Scribner's Magazine, September 1912, p. 370.
Practice and Procedure.
"Reform in the Judicial Administration of Justice."—75 Central Law Journal, 127.
"Cardinal Principles to be Observed in Reforming Procedure."—75 Central Law Journal, 150.
"The Scientific Attitude toward Reform in Procedure."—75 Central Law Journal, 147.
"Let Congress Set the Supreme Court Free. (Grant to Supreme Court of power to reform legal procedure.)"—75 Central Law Journal, 126.
"Reform in Legal Procedure from the Practitioner's Standpoint—A Review of the New Jersey Practice Act."—75 Central Law Journal, 144.
Real Property.
"Individual and Communal Land Tenure in Russia."—37 Law Magazine and Review, 385.
Statutes.
"Amendments to the New York Code of Civil Procedure in 1912."—11 Bench and Bar, 14.
Voters and Elections.
"The Two Conventions at Chicago."—Scribner's Magazine, September 1912, p. 259.
"The Hard-Cider Campaign of 1840."—Century Magazine, September 1912, p. 677.
War.
"World's Greatest Question."—The Fra, September 1912, p. 161.

The law is the calling of thinkers. But to those who believe with me that not the least god-like of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere: that there as well as elsewhere his thought may find its unity in an indefinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.—*Hon. Oliver Wendell Holmes.*

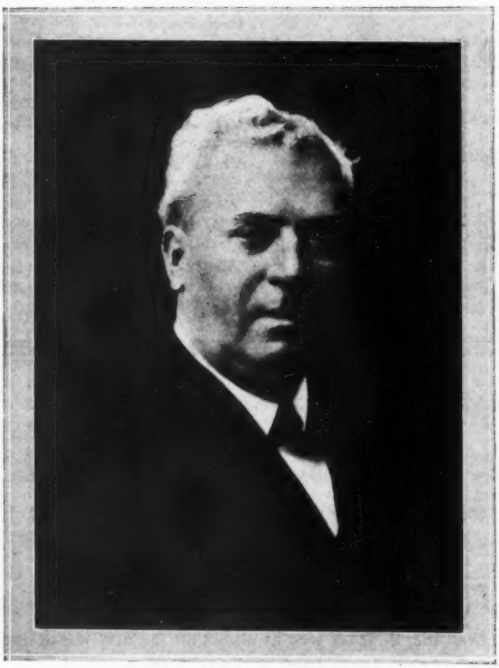


Judges and Lawyers

A Record of Bench and Bar

Hon. James V. Coffey

THE labors of James V. Coffey, as journalist, lawyer, legislator, and judge cover a period of over forty years, and entitle him to a conspicuous place in the history of the state and nation, and constitute a remarkable record.



HON JAMES V. COFFEY.

As a young journalist he was for a period of seven years the leading editorial writer of the Examiner in the days of Honorable Philip A. Roach, B. F. Washington, and George Pen. Johnston. People read his editorials and were swayed by them.

The earlier years of his legal career were coincident with his editorial work. His legal education began at a very early age, and he served an apprenticeship for years in some of the best offices in New York city, where he acquired a knowledge of the old as well as the new systems of practice, pleading, and procedure, and became familiar with all branches of the profession, common law, equity, civil, commercial, and criminal. When he went to the Pacific coast his thorough general knowledge enabled him to secure an important position in Virginia City, in the then territory of Nevada, where for three years he was chief clerk of the first district attorney of Storey county, Honorable Dighton Corson since chief justice of South Dakota. Incidentally he became expert in mining law, as that was the period of the early mineral development of Ne-

vada. Upon his return to San Francisco he entered the office of Elisha Cook, distinguished as a criminal lawyer and equally noted as a leader in general civil practice. Subsequently he was engaged by Eugene Casserly as his private secretary, and served in that capacity for several years, until after Mr. Casserly's retirement from active practice and departure for Washington, as United States Senator. During his connection with Mr. Casserly, the latter was in the full tide of his success as a practitioner as the head of the firm of Casserly & Barnes, and his range of practice embraced the entire circle of the law. He was recognized as a scholar and lawyer of the first rank, none excelling him in erudition or skill. It was the era of McAllister, Wilson, Felton, Pringle, McKinstry, Hager, Haight, Wallace, Baldwin, McDougall, Thornton, Hoffman, Lake, Doyle, Field, and lawyers and judges of that stamp, and Mr. Casserly was universally conceded to be the peer of the best in all departments of jurisprudence. It was in this atmosphere that Mr. Coffey received his final tuition prior to his admission, although for a long time subsequently he continued in confidential relations with Senator Casserly. He was admitted to the bar in the year 1869, in a class with the late Honorable John M. Coghlan, afterwards in Congress, the late George R. B. Hayes, Honorable James W. Harding, Edward Gray Stetson, Samuel D. Woods, recently Representative in Congress, Henry P. Bowie, and others, all of whom attained distinction in their profession. In consequence of his close study of the law, combined with his natural faculty for concentration of mind, his rise to prominence was rapid, and shortly afterwards he became a very successful practitioner in San Francisco, pleading some most important cases in both the Federal and state courts.

He was taken from the editorial staff to serve in the sessions of 1875-6 and 1877-8. He was elected before the present Constitution was adopted, which forbids special legislation, and as the chairman of the San Francisco delegation he came directly in contact with every measure that came up. He was up against as corrupt a lobby as ever haunted Sacramento. Being sensible, logical, and gifted with a remarkable facility of expression, besides being a proficient parliamentarian, he fought them sometimes single handed, and, by clean-cut argument and cutting invective, scattered their hosts. He was not the kind of man the evil doers wanted, nor could he be reached by sordid considerations, and he positively refused to be intimidated. This was over thirty years ago, but there is a bright and honorable page of history at Sacramento to the credit of James V. Coffey.

After four years of hard work he succeeded in having passed a bill, drafted by him, giving the power to the municipality to regulate gas rates in the city and county of San Francisco. It fell to his lot to defend this act before the supreme court against eminent corporation counsel, and he was successful in sustaining its constitutionality. The terms of this measure are now incorporated in the state Constitution. For his successful work in this particular, so beneficial to the community, he was the object of corporate animosity, but he persisted in his purpose to a finality.

Through his efforts the police and fire departments were on a civil service basis, and the rank and file protected in their tenure of office from arbitrary removal, and their salaries maintained at a rate which was self-sustaining, believing that meritorious service should receive adequate reward. He also facilitated the passage of the act reducing the street car fares from 10 to 5 cents,—a great reform in those days, strenuously opposed by the local railroad companies.

In addition, he successfully opposed an attempt of the Southern Pacific to secure every available parcel of public land surrounding the water front of San Francisco, thereby giving absolute power to shut out competition. In this opposition he succeeded at the last moment in defeating an almost consummated conspiracy to appropriate for private purpose public property.

The record of Judge Coffey as the presiding judge of the probate department of the superior court is known to the profession throughout the English

speaking world. Before he was assigned to that department, however, he presided for about a year in the civil department of the court; and tried scores of the most complicated cases, many of which were appealed to the supreme court and were almost invariably affirmed. From time to time while in the probate department he has been assigned many civil cases involving intricate questions of law and equity.

As the presiding judge of the probate department he has a record unrivaled in the history of the bench of this or any other state. Vast estates have come before him for administration, and his decisions in contested matters have been seldom modified. In many important cases his rulings have been so manifestly sound that the losing parties have declined to appeal.

The accumulation of so many years of studious work makes a library in itself, and during his incumbency Judge Coffey has passed upon estates whose aggregate value amounts to over five hundred millions of dollars.

His "Probate Decisions," recently published in five volumes, cover a period of twenty-eight years of judicial work, and are regarded as authority throughout the United States by the profession. The fourth volume contains an exhaustive review of the celebrated Blythe Case, and occupies 254 pages. This was the most sensational proceeding over a great estate ever seen in California, if not in the United States. It was in court over fifteen years. The estate, valued at five millions, was finally awarded to Florence Blythe, the daughter of Thomas H. Blythe. In this case the administrator proposed to use the proceeds of the San Francisco property to speculate in Mexican lands, but Judge Coffey refused to allow him to divert the funds for such purposes, and thus prevented what might have been a disastrous loss to the estate.

The great estates that have come before the judge are too numerous to mention. The Blythe, Dolbeer, Martin, Theresa Fair, Stanford, Crocker, Hopkins-Searles, Sutro, Hearst, Mackay, and Claus Spreckels estates are among the most important.

Judge Coffey has always protected the widow and the orphan, and he was the first judge in the country who declared that the fees of lawyers in probate matters must be graded according to the value of the estate. He established in his court an equitable scale of fees, and the common sense and honesty of this system were so apparent that the principle of the schedule was adopted throughout the country. This is one of the greatest services ever rendered to the people by an American judge.

He has been an honor to the superior bench for three decades.

Death of Justice Blair.

Justice Charles A. Blair, of the Michigan supreme court died at Lansing, Michigan, on August 30, after several weeks' sickness. He was born in Jackson, Michigan, in 1854, and was the son of Austin Blair, who was known as "Michigan's war governor." Justice Blair was appointed to the supreme court in 1904 to fill a vacancy, and remained on the bench until his death.

Leading Maine Lawyer Dead.

Honorable Herbert M. Heath, a leading lawyer of Maine, long active politically and a defeated candidate for the nomination for United States Senator under the first preferential primaries, of which he was joint author, died suddenly at his home in Augusta on August 18th.

Herbert Milton Heath was graduated from Bowdoin College in 1872, being valedictorian.

He was assistant secretary of the Maine senate in 1870-1873, taught school while studying law, later in the office of Judge Danforth of the Maine supreme court, was admitted to the bar in 1876, and had since practised law at Augusta, becoming one of the leading constitutional lawyers not only of his own city, but of the state. He was as highly rated as an orator as he was a lawyer.

Twice he declined a place on the supreme bench of Maine.

Hon. James A. Collins

Judge of the City Court of Indianapolis

In the campaign of 1909, James A. Collins pledged the people of Indianapolis that if elected judge of the city court he would introduce a probation system as a means of helping delinquent men and women. The electors chose him to that position and he has fulfilled his pledge to them in a manner productive of splendid results.

HON. JAMES A. COLLINS.

Under the provision of an act of the legislature of 1907, the several circuit and criminal courts of Indiana are exercising the power to release upon suspended sentence persons convicted of a felony or misdemeanor, excepting in cases of murder, arson, rape, burglary, treason, and kidnapping, and to parole them under the supervision of the prison authorities upon the same conditions that obtain in the cases of persons released under the provisions of the indeterminate sentence law.

While the act of 1907 does not, in express terms, give the city courts the power to suspend sentence and withhold judgment, yet under the provision of the law creating these courts and defining their jurisdiction, they are given the same power as circuit and criminal courts in those cases over which they have concurrent jurisdiction with them. This law of 1907, therefore, made possible the introduction of a probation system in all courts of the state exercising criminal jurisdiction. Judge Collins believed that "to properly adminster justice in the police court the presiding judge should earnestly endeavor to distinguish between the delinquent and the criminal,—the occasional and the chronic violator of the law; to give sufficient time for careful investigation of the merits of each case, and to see that while the community is protected, the rights of the individual, particularly of the poor and ignorant and uninfluential individual, be not overlooked."

"Could you witness," he states, "as I have on many a Monday morning, the pitiable scenes of wives and mothers and sobbing children crowding the corridors of the police court, pleading with officers and attaches of the court to say a word to the judge in behalf of a husband or father, you would then understand the need of a different system of dealing with this class of people. Much of their suffering comes from the assessment of the fines which the defendant is unable to pay or replevy. He is imprisoned not because the court believed he should be imprisoned, as there was no term of imprisonment added, but because he is unable to

pay the fine. In other words, he is imprisoned for debt, which was abolished in this country many years ago.

"To reach this situation and to aid this particular class I have introduced, in connection with and as a part of the probation system, a plan for the collection of fines without imprisonment. In those cases where a defendant has others dependent upon him for support, I release him on his own recognizance, and hold the case under advisement for thirty to sixty days as the circumstances seem to justify, and inform him that at the expiration of the time fixed he must come into court prepared to pay his fine of $1 and costs, or $5 and costs, as the case may be."

In Judge Collins's opinion, a probation system without a plan of thorough investigation would be no better than the old system of merely suspending sentence and permitting the defendant to go without any regard to his future. Through adequate investigation only the court is able to get at all of the facts and circumstances surrounding the defendant, and to render judgment for the best interests of the individual, the family, and the society.

It would be impossible to convey through the medium of this sketch the splendid results that have been obtained through the court's exercising a friendly interest in the unfortunate. The reports to the court show that home conditions have improved; that men have abstained from the use of intoxicating liquor; that employers have been enlisted in taking a more friendly interest in employees; that many have joined churches, and in other ways have attained to a higher standard of living.

The responsibility resting upon the judges of the inferior courts of criminal jurisdiction has been well stated by Judge Collins in these words:

"The police court has been aptly termed the poor man's court. To many of the poorer class it is the only court with which they have any dealing. It is their court of last resort. True as this is of the sons of our own soil, it is doubly true of those children of foreign lands who have come to us seeking a wider opportunity for themselves or for their children. Because of their ignorance of our language and customs they are very easy victims of graft and abuse. Let them not find in the "land of liberty" a land of bitter oppression. It behooves the community to remember that the immigrant of to-day is the citizen of to-morrow. Now is he as clay in the hands of the potter, to be made or marred in the molding; let him be guided firmly and gently, and above all, with absolute justice." Judge Collins is forty-two years of age, and a native of Massachusetts. He has practised law in Indianapolis for nearly eighteen years. In 1902 he became interested in and assisted Judge George W. Stubbs in organizing the Juvenile Court. It was while aiding him in that work and subsequently in developing the volunteer probation system as used in that court that he received the inspiration to work for a similar plan for the city court.

Ex-Chief Justice of Hawaii Dead.

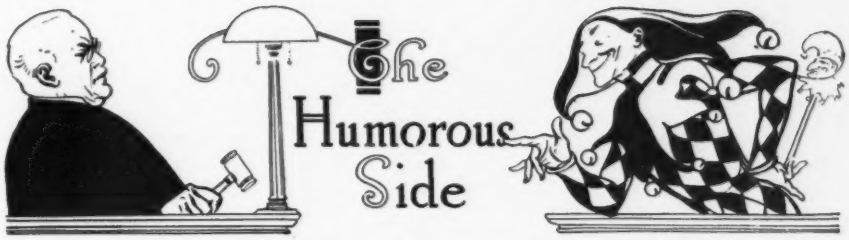
Alfred Stedman Hartwell, former chief justice of the supreme court of Hawaii, died on August 30th. He was seventy-six years old. Judge Hartwell was one of the pioneer Americans in Hawaii.

Born in Dedham, Massachusetts, he was graduated from Harvard College with the class of '58, but did not study law until after enlisting in the Civil War, through which he served with distinction, being brevetted brigadier general.

In 1867 he was elected to the Massachusetts legislature, and the following year was appointed associate justice of the Hawaiian Islands under the monarchy. In that position he served until 1874, when he became Attorney General.

Active in the revolution which finally brought Hawaii under the flag, he became special agent of the Republic of Hawaii at Washington in 1899-1900.

When the Federal courts were established in the islands, Judge Hartwell again became associate justice of the supreme court, becoming chief justice in 1907. He resigned in 1911.



Laugh when you are tickled, and laugh once in a while anyway—Josh Billings

Not Wet Enough. Lambert Caspers, a Chicago attorney, told this story at a recent Y. M. C. A. banquet:

A Kansas farmer, a Dane, applied for naturalization papers. The judge asked him:

"Are you satisfied with the general conditions of the country?"

"Yas," drawled the Dane.

"Does the government suit you?" queried the judge.

"Yas, yas; only I would like to see more rain," replied the farmer.—Judge.

Held by the Family. "When I first decided to allow the people of Tupelo to use my name as a candidate for Congress I went out to a neighboring parish to speak," said Private John Allen recently to some friends at the old Metropolitan Hotel in Washington.

"An old darky came up to greet me after the meeting. 'Marse Allen,' he said, 'I's powerful glad to see you. I's known ob yo' sense yo' wuz a baby. Knew yo' pappy long befo' you-all wuz bohn, too. He used to hold de same office you got now. I 'members how he held dat same office fo' years an' years.'

"'What office do you mean, uncle?' I asked, as I never knew pop held any office.

"Why, de office of candidate, Marse John; yo' pappy was a candidate fo' many years."—San Francisco Chronicle.

The Result of the Primary. It had been a hard day at the polls. The addition of nearly a thousand women's votes to the poll made the counting a prolonged proposition.

"Well, James," said Mrs. Wallicky, as her husband returned from his arduous labors as a teller, "how did the vote go?"

"Nine hundred and two votes for Bildad, 753 for Slathers, eight recipes for tomato ketchup, four wash lists, and a milliner's bill," said Wallicky. "It was a mighty interesting vote."—Judge.

Probably Not. It was at a suffragette meeting. A woman was speaking bitterly of the many rights and privileges which the men enjoyed but which were so unjustly denied to the women.

"Say," broke in a male hearer, tauntingly, in a small, high-pitched voice that sounded well in proportion to his physical make-up, "wouldn't you like to be a man?"

"Yes," replied the woman, "wouldn't you?"—Harper's Monthly Magazine.

How the Stairs Run. A lawyer was cross-examining an old German about the position of the doors, windows, and so forth, in a house in which a certain transaction occurred.

"And now, my good man," said the lawyer, "will you be good enough to tell the court how the stairs run in the house?"

The German looked dazed and unsettled for a moment.

"How do the stairs run?" he queried.

"Yes, how do the stairs run?"

"Vell," continued the witness, after a moment's thought, "ven I am oop stairs dey run down, and ven I am down stairs dey run up."—Birmingham Ledger.

Lost no Time. A colored attorney walked rapidly into the court room, fol-

lowed by a large colored woman. She had her sleeves rolled up to the elbows and appeared to have come from the washtub. Her manner was businesslike. "Ah wants to probate mah husband's will," she said. The judge went through the usual procedure. He read the will and asked the usual question. Then he began making the usual notations. "And when did he die?" the judge asked. "Jes' about a half hour ago," was the answer.—Argonaut.

Grounds for Divorce. A Cleveland lawyer overworks the telephone to tell us this one, says the Plain Dealer:

"A woman came up to my office the other day and wanted to know if she could get a divorce because her husband didn't believe in the Bible. I told her that unless she had something else for grounds for divorce it was no use bringing suit.

" 'But he is an absolute infidel!' she insisted.

" 'That makes no difference,' said I.

" 'Doesn't it, indeed?' she cried, triumphantly. 'Well, you are a fine lawyer, I must say. Here's the laws of Ohio, and they say that infidelity, if proved, is a ground for divorce!' "

A Poor Cure. Mayor Speer, of Denver, at a recent temperance banquet, was discussing a drink cure of little efficacy.

"When I think of this cure," he said, "I recall a poor old woman with a red nose who entered a magistrate's office and said:

" 'I'd like to take the pledge, if ye please.'

" 'Very good,' said the polite clerk. 'And how long did you wish to take it for?'

" 'In the past,' said the old woman, 'I've always took it for life.' "

'Nuff Sed. No. 13—What kind of a lawyer did you have? No. 23—Well, de jury was out five minutes.—Chicago Daily News.

Counsel Fees. Georgia Lawyer (to colored prisoner)—Well, Ras, do you want me to defend you? Have you any money?

Rastus—No; but I's got a mule, and a few chickens, and a hog or two.

Lawyer—Those will do very nicely. Now, let's see; what do they accuse you of stealing?

Rastus—Oh, a mule, and a few chickens, and a hog or two.—Life.

L.R.A. A law-book salesman who had on several occasions endeavored to sell Senator J. K. Cubbison, of Kansas City, Kansas, a set of Lawyers Reports Annotated, recently met the senator in another lawyer's office.

"Hello there, Mr. L.R.A.," shouted the senator in greeting.

An introduction to the neighboring lawyer followed.

"Yes, I am selling the L.R.A.," began the salesman to his new acquaintance.

"Pardon me," replied the lawyer, "I have all the fraternal insurance I need."

Brother Was Lying. Police courts are not always marked by an atmosphere of piety, but the exception to the rule occurred in a court where a very religious man, against whom one of the neighbors had made a complaint, was being tried for some trivial offense. The complaining witness was called to the stand to relate his side of the story, and the defendant listened closely for several minutes. Then his personal feelings overrode court etiquette, and he rushed up to the judge, fervently exclaiming: "Your Honor, the brother is lying. Praise the Lord!"

Protected. The late Thomas B. Reed, when a lad, was requested to bail out a small boat that had been leaking badly, and was almost full of water.

"I can't do it," replied Tom. "It's unconstitutional."

"What do you mean?" inquired the owner of the boat.

"The Constitution of the United States says," replied the future statesman, "that 'excessive bail shall not be required' of any man."—Youth's Companion.